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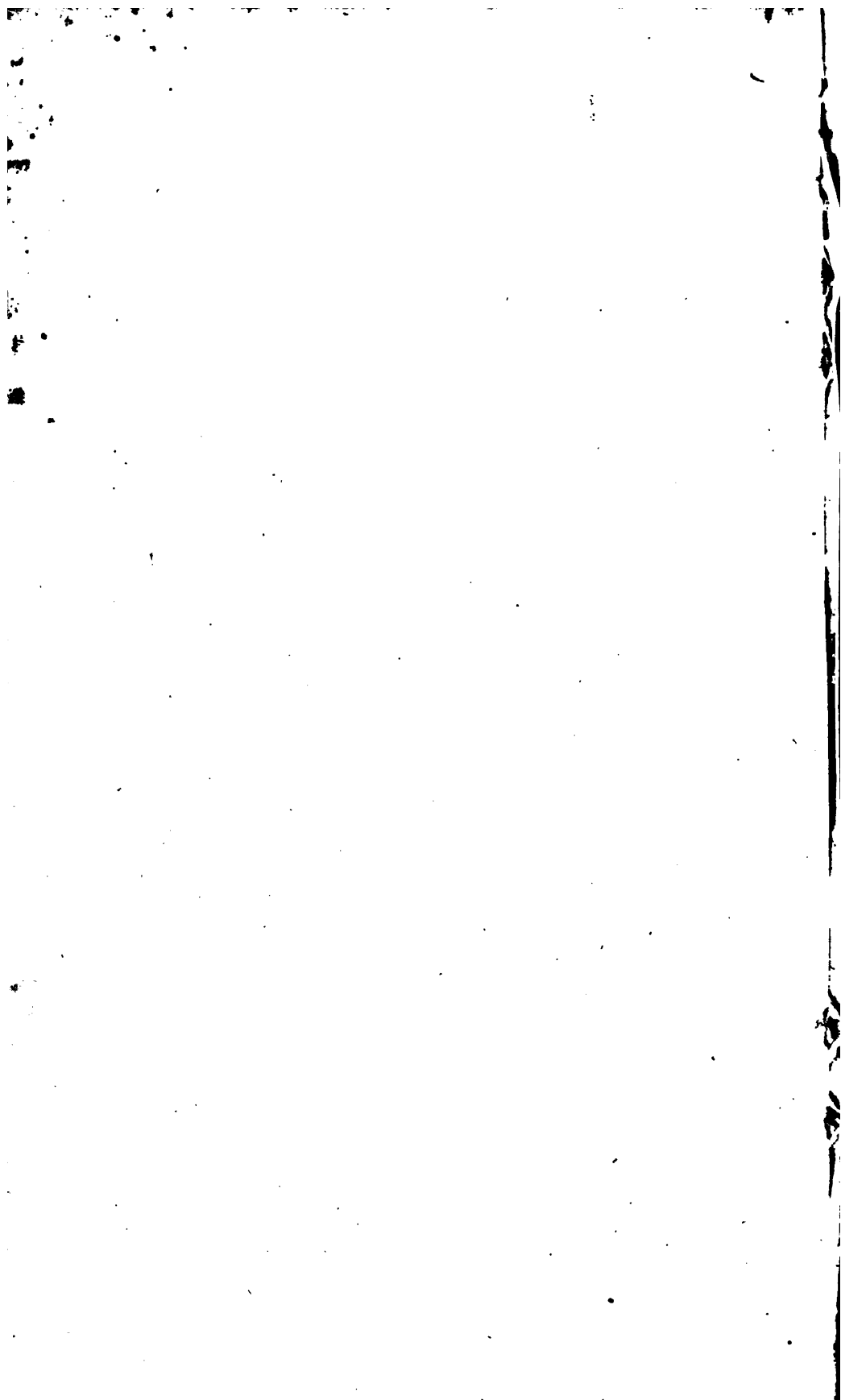
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In Memory of
Francis Michael Carroll

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AN
ESSAY
ON
MARKETABLE OR DOUBTFUL
TITLES
TO REAL ESTATE.

BY S. ATKINSON, ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

FROM THE LAST LONDON EDITION.

PHILADELPHIA:
JOHN S. LITTELL,
Law Bookseller and Publisher.
HALSTED AND VOORHIES, NEW YORK.
1838.

J. VAN COURT, PRINTER,

Quarry, near Second st.

ADVERTISEMENT.

It may facilitate the perusal of the following Essay, and define the objects for which it may be consulted, to indicate concisely its general plan.

The main object is to illustrate the principles, and explain the practice, of Equity as to Marketable Titles. This involves a preliminary inquiry into the nature of suits for the specific performance of contracts for the sale of estates; as it is in such suits only that it becomes necessary for the Court to determine judicially, whether titles be such as a purchaser ought to accept.

In a suit for the specific performance of a contract of sale, there are two issues or questions for the determination of the Court—

1st. Whether there be a valid contract at law, and such as, regard being had to the principles of equity, ought to be enforced?

2nd. Whether the vendor has a good title?

Hence, the subject-matter of the following Essay naturally distributes itself under three heads:—*first*, a general explanation of the subject which involves, more particularly, an account of the meaning of the expressions *marketable title* and *doubtful title*;—*second*, the principles and practice of Courts of equity, in determining whether a contract ought to be enforced; and *lastly*, the grounds upon which titles may be defective. And, accordingly, into these three heads, the following pages are divided.

The last of these, in which the subject of title is considered, is also subdivided into three sections; in the first are stated the grounds on which the purchaser may object to the title,—in the second, is considered, the extent to which his right may be limited by the particulars and conditions of sale,—and, in the third, will be found a concise advertence to the acts by which his right to have a strict title may be waived.

The Appendix contains a more accurate and copious report than is

elsewhere to be had, of Lord Hardwicke's judgments in *Chesterfield v. Jansen*, and several cases of leading authority in reference to the sale of leaseholds by executors.

With respect to the titles to advowsons and tithes, the reader is apprized, that, in considering what is stated on this subject, regard must be had to the late act of 2 and 3 Will. 4, c. 100, which will also be found in the Appendix.

8, OLD SQUARE, LINCOLN'S INN.

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AN ESSAY
ON
MARKETABLE OR DOUBTFUL
TITLES.

CHAPTER I.

Introductory Observations on the nature of Doubtful Titles.

IN attempting to take a view of the present state of the law relative to what shall be considered a *marketable title*, it is obvious that the subject might be limited to a consideration of the equitable doctrine of *doubtful titles*. A more practical, however, and comprehensive survey of the subject will soon show, that so closely is the doctrine of marketable titles interwoven with the general law applicable to the transactions between vendor and purchaser, that the former cannot be adequately treated apart from the latter. It is proposed, therefore, *in the following [*2] pages, to treat the subject of marketable titles on a broad and comprehensive foundation; and to employ in it a copious and detailed exposition of the present state of the law relative to vendors and purchasers.

The subject of marketable titles involves a doctrine, which is peculiar to the laws of this country, and which is recognized only in our Courts of Equity; and constitutes one of those numerous branches of equitable jurisdiction which have been brought into existence during the last century. The ordinary acceptance of the term *marketable title*, would convey but a very imperfect notion of its legal and technical import. To common apprehension, unfettered by the technical and conventional distinctions of lawyers, all titles being either good or bad, the former would be considered to be marketable, the other non-marketable. But this is not the way in which they are regarded in our courts of equity, the distinction taken there being,—not between a title, which is absolutely good, or absolutely bad,—but between a title, which the court considers to be so clear that it will enforce its acceptance by a purchaser, and one which the court will not go so far as to declare it a *bad* title, but only that is subject to so much doubt that a purchaser ought not to be compelled to accept it.(a) In short, whatever may be the private opinion of the court,

(a) See *Jervoise v. The Duke of Northumberland*, 1 Jac. & Walk. 568.
APRIL, 1838.—B

[*3] *as to the goodness of the title, yet if there be a reasonable doubt either as to a matter of law or matter of fact involved in it, a purchaser will not be compelled to complete; and such a title, though it may be perfectly secure and unimpeachable as a *holding* title, is said, in the current language of the day, to be *unmarketable*.

It is not, perhaps, very important now to enquire how it happened that a court of such high and potent jurisdiction as the Chancery, should have permitted itself to entertain so ambiguous a doctrine as that of *doubtful* titles; but yet a short consideration of the reason may be useful, inasmuch as it will show that this doctrine has sprung from the imperfect powers of the court for deciding upon questions of title, and will account for the existence of a different practice at law. If a true regard to its own dignity and the interests of its suitors, had prevailed in this instance, it is not very difficult to see that it would never have recognized such a doctrine. The court would have felt that it was bound to decide conclusively between the claims of litigating parties, and if its authority was not large enough to enable it to clear up all the doubts which could be raised, means would have been found to render its power concurrent with the necessities of its jurisdiction.

The title to landed estate must, it is needless to observe, generally involve a considerable series both of matters of fact and matters of law:—the former extending over a period of sixty years at least, and very often

[*4] more nearly to a century; the latter *embracing the construction of the series of deeds, wills, and other legal documents which constitute the various links of title during that period. It is not matter of surprise, therefore, that questions should very frequently arise which involve great nicety both as to certain facts and certain points of law. For dealing with such questions the powers and machinery of the Court of Chancery are very imperfectly constructed, and, in fact, altogether unequal to the final and conclusive disposition of them. In suits for specific performance, (b) the court has no power, except

[*5] on the application, or by the consent of all parties *to the suit, to direct an issue for the determination of a matter of fact; nor can it, without such application or consent, direct a case or

[*6] an action for the purpose of satisfying itself on a point of law(c). *Hence, if any doubts arise either as to the fact or

(b) *Roake v. Kidd*, 5 Ves. 647. An heir at law may have an issue *devisavit vel non* in a suit for establishing a will against him, and a rector an issue to try the validity of a *modus* in a suit for the payment of tythes, at the hearing of the cause as matter of right; and these are the only cases in which an issue can be so claimed. It cannot be doubted that a legislative enlargement of the power of the court, in matters of this kind, would contribute greatly to its efficiency in the administration of justice.

One of the suggestions for the improvement of the court, left among the papers of Sir S. Romilly, was this, "that the court should have power, upon motion, in cases where it sees expedient, to direct an issue before the hearing." (Report of Ch. Com, App. A. p. 54.) It would seem to be equally expedient to arm the court with more extensive powers for getting the opinion of a court of competent jurisdiction on matters of law.

It may seem also to be deserving of consideration whether the court ought not to have more compulsory powers for compelling the trial of an issue or a case, and of granting an issue or a case, on the application of one party to the suit, where the whole merits of the case turn upon the decision of a simple fact or point of law.

(c) The state of the law on this subject is singular: It seems the court has no authority to direct a case without the consent of the parties, and if such a case be directed neither the Chancellor (*Prebble v. Boghurst*, 1 Swanst. 320,) nor the parties to the suit are bound by the certificate, which may be returned. (*Sharp v. Adcock*, 4 Russ. 375.)

the law involved in the title, and the purchaser be an *un- [*7]
 willing one, as his consent cannot, of course, be had to an
 issue or a case, the court therefore being *deprived of the [*8]
 only competent means of informing its conscience, is placed

Though the Chancellor has no authority to direct a case without consent for the purpose of informing his conscience, he has power to call in the judges to give him their opinion as assessors; but what they say is merely opinion and advice, and no way binding upon him. This is well illustrated in the great case of the Duke of Norfolk, (3 Ch. Ca. 1.) In that case Lord Nottingham called in to his assistance, the Lord Chief Justice Pemberton, Lord Chief Justice North, and the Lord Chief Baron Montague, all of whom delivered their opinion clearly against that of the Lord Chancellor, but he nevertheless decided on his own opinion. The manner in which, in this most eloquent judgment, his lordship refers to this point, is very beautiful:—"What hath been said here at the bench on both sides, has been taken in short-hand, and made public; I know the counsel on both sides hath seen it, or will see and look into it well; and if they can give me any reasonable satisfaction that I am in the wrong, I shall easily recede from it. But upon anything yet offered, I am of the same mind I was. As to the learned judges that assisted me at the hearing, *the decree is mine, and the oath that decree is made upon is mine, theirs is but learned advice and opinion.* And therefore, if they can satisfy my conscience that they are in the right, and I not, well and good; if not, I must abide by that decree, I have made according to my conscience, (ibid 39.) And, again, on a subsequent day—"In truth I am not in love with my own opinion, and I have not taken all this time to consider of it, but with very great willingness to change it, if it were possible: I have as fair and as justifiable an opportunity to follow my own inclinations, (if it be lawful for a judge to say he has any,) as I could desire; for I cannot concur with the three chief judges, and make a decree that would be unexceptionable. *But it is my decree, I must be saved by my own faith, and must not decree against my own conscience and reason.*" (ibid 47.) And finally, after having by the most conclusive series of arguments, delivered with the greatest consideration, and at long intervals, satisfied himself that the settlement, which it was the object of that suit to set aside, was "good both in law and equity," he concludes thus:—"If I could alter my opinion, I would not be ashamed to retract it; for I am as other men are, and have my partialities as other men have. When all this is done, I am at the bar desired to consider further of this case. I would do so if I could justify it; but expedition is as much the right of the subject as justice, and I am bound by *Magna Charta* "*Nulli negari, nulli differre justitiam.*" I have taken as much pains and time as I could to be informed; I cannot help it, if wiser men than I be of another opinion: but every man must be saved by his own faith, and I must discharge my own conscience," (ibid 52.)

In *Wykham v. Wykham*, (18 Ves. 395) the Court of King's Bench in a case sent for its opinion, certified that certain parties took an estate in fee, the Court of Common Pleas on the same case, certified that they took nothing.—Lord Eldon differed from them both, and decreed accordingly.

In *Lansdowne v. Lansdowne*, (2 Bligh 86,) Lord Eldon, adverting to a statement that the Lord Chancellor of Ireland after the return of the certificate from the Common Pleas, retained an opinion contrary to that certificate, but made a decree according to it, from deference to the judges of the Common Pleas, observes "In that surely there must be some mistake; for although it is highly useful in legal questions, to resort to the assistance of courts of law, yet it must be well known to those experienced in the practice of courts of equity, that they are not bound to adopt the opinion of the courts of law, to which they send for advice. It has occurred to me," said his lordship, (adverting probably to *Wykham v. Wykham*, just cited), "to send the case successively to the Court of King's Bench and Common Pleas, and not to adopt the opinion (though highly to be respected) of either of those courts."

The application for the new trial of an issue must be made to the judge by whom the issue was directed, (Lord Lyndhurst's Orders in Chancery, No. 47:) The party applying for new trial must, on an *ex parte* application, satisfy the judge that there is reasonable ground for questioning the verdict, before he will send to the judge who tried the issue for his notes of the trial, (*Morris v. Davies*, 3 Russ. 318.) Where on the trial of an issue out of Chancery, it is ordered that a third party should be at liberty to attend the trial, the counsel for such party will not be permitted to call witnesses; or address the jury, on the principle that if the court which decreed the issue had intended to allow him this privilege, he would have been made a party to the issue. If he were allowed to address the court, there appears to be no reason why he should not also be allowed to call witnesses; and, if so, then a case might be presented to the court, wholly different from that in contest between the plaintiff and defend-

in this dilemma,—either to take upon itself the decision of the fact or the construction of the law, which it would do “at the hazard of what might [*9] be afterwards determined in a *court of law,”(d)—or to refuse to interfere on behalf of the vendor, an alternative which it is entitled to take, on the principle that a bill for the specific performance of a contract, is an application to the discretion of the court, and a decree cannot, therefore, be claimed as a matter of right. The alternative which a Chancellor, having before him the fear of the verdict of twelve jurymen, or the opinion of the twelve judges of England would adopt, is very obvious; he would exercise his discretion by declining to interpose the extraordinary jurisdiction of the court, rather than incur the hazard of having his decree, and all the proceedings upon it, over-hauled and nullified by the decision of a court of common law.(e)

It is scarcely necessary to observe, that the jurisdiction of enforcing the performance of contracts is not of very remote origin, and was at first very sparingly exercised; the court, until this jurisdiction was fully [*10] established, never entertaining the *suit unless the party seeking performance had first obtained damages at law, which, where they had been obtained by the vendor, had the effect of giving the sanction of a court of law to the title, and consequently rendered it unnecessary for the Court of Chancery to agitate its validity. This practice was changed by Lord Somers, the first Chancellor who appears to have

ant, and by consequence a different issue raised from that intended to be raised by the order. On this ground such a party is allowed only to cross-examine, and submit points of law.

The grounds on which courts of equity grant new trials, essentially differ from those on which courts of common law proceed. In *Savage v. Carroll*, (2 Ball and Best. 445,) on a motion for a new trial, on the ground that the verdict had not been supported by evidence, Lord Manners laid it down that “to enable the court to disturb the verdict, it must be either contrary to the evidence, or given under the misdirection of the judge.” This is a very narrow and imperfect, not to say very erroneous, statement of the grounds on which courts of equity grant new trials. The true question is, whether the Lord Chancellor, looking to all the proceedings both in equity and at law, be satisfied; for if he be satisfied he will not direct a new trial merely because the judge who tried the issue, miscarried in his direction, or evidence was rejected which ought to have been omitted, or *vice versa*. The leading cases are, *Stace v. Mabbott*, 2 Ves. sen. 552; *Matthews v. Warner*, 4 Ves. 186; *O'Connor v. Cooke*, 8 Ves. 535; *Warden of St. Paul's v. Morris*, 9 Ves. 145; *Pemberton v. Pemberton*, 11 Ves. 50; *ib.* 13 Ves. 289; *Hampson v. Hampson*, 3 Ves. and Bea. 41; *ex parte Kensington, Coop.* 96; *Whalley v. Whalley*, 3 Bligh, 1; *Trimbletown v. Lloyd*, 1 Bligh, N. S. 427; *Powell v. Sonnet*, *ibid.* 545; *Burnand v. Nerot*, 2 Bligh, N. S. 215; *Wilkinson v. Chapman*, 3 Russ. 145; *White v. Lisle*, *Swanst.* 344; and see the references in 8 Bro. P. C. (Index.) titles “Issue” and “Trial (new.)”

Courts of common law will not answer a case stated as a trust; the question must be raised on a legal estate, (*Parsons v. Parsons*, 5 Ves. 581; *Bailey v. Morris*, 4 Ves. 793;) nor will they answer a case on a limitation of money, but it may be stated as a limitation of a term of years, (*Doo v. Brabant*, 4 T. R. 710;) nor will they answer speculative or hypothetical questions,—the case must state an actual conveyance that will raise the question, (*Bliss v. Collins*, 1 Jac. and Walk. 427;) and this, says Lord Eldon, is included in the usual direction in the order, that all facts necessary to bring the matter into question are to be stated. (*Ibid.*) The case ought, properly, to be signed by the counsel on both sides, but if the counsel on either side will not sign it, the course is, that they are understood to waive the benefit of it. (*Ibid.*)

(d) *Jones v. the Parishes of Montgomery*, 3 Swant. 226.

(e) The motive which may be supposed to have influenced the court in cases like these is not ineptly alluded to by Sir Anthony Hart, who, in reference to a suit for partition of a house, at the instance of tennors, says, “the partition of the house must re-model and reconstruct the whole fabric of the building; and it would throw some discredit upon the jurisdiction of the court, if the landlord, disliking the alterations, should, in defiance of the decree, enter for the waste committed, and turn both parties, with the court and its decree, out of doors.” (*North v. Guinan*, 1 Beatt. 345.) See *Halsey v. Grant*, 13 Ves. 76, as to the origin of the equitable jurisdiction for specifically enforcing contracts.

entertained the jurisdiction of decreeing performance of an agreement, in cases where the plaintiff had not previously obtained damages at law. (b)

In consequence of this change in the practice, it became necessary for the court in a suit for specific performance, to look at the title; for it would have been a very curious sort of equity to compel a purchaser, objecting on the ground of a defective title, to accept a bargain for an estate, without its being satisfactorily shown that the alleged defect had no existence. Hence arose the collateral, or secondary, issue, which is always determined in the first instance by a reference to the master, to enquire "whether the vendor can make a good title?" the first and principal issue in the suit, that which is tried at the hearing of the cause, being whether the contract be a good and valid contract, free from fraud, and such as in equity *and good conscience ought to be carried into effect? [*11] The right determination of this secondary issue, necessarily raised all the questions of law and fact involved in the title. And it is obvious, by adverting to what has been already stated, that when it became necessary for the court to look at these questions, its imperfect jurisdiction in matters of fact and law, would very soon be felt; and that, as a necessary consequence, the powers of the court must be enlarged, or *doubtful* titles would spring into existence. The latter course was unfortunately suffered to prevail, and accordingly we find, that the introduction of the doubtful title doctrine was almost simultaneous with the change of practice introduced by Lord Somers, the first reported case (c) on this subject, having been decided by Sir Joseph Jekyll, his cotemporary and friend,—and, therefore, of necessity, very shortly after that period, when the court took upon itself to enforce the specific performance of a contract, without first sending the plaintiff to establish his right in a court of law. (d)

*In *Marlow v. Smith* the question was whether a trust estate passed under general words of devise; for if it did pass, [*12] a good title could not be made. It was argued that "if there was the least doubt of the title (which it was made to appear there was, by the opinions of Serjeant Hooper and Mr. Webb,) it would by no means be proper for the Court of Chancery to compel the purchaser to accept the title; for in such case, if the purchaser should be sued, where could he have recourse to for redress?" And Sir Joseph Jekyll, M. R., after intimating his concurrence in the doubts which had been raised, refused accordingly to enforce the contract, observing that "there being the opin-

(b) See *Dodsley v. Kinnersley*, Amb. 406, where Sir Thos. Clarke, M. R., speaking with reference to a patentee seeking an account says, "the old practice was like the case of agreements before Lord Somers's time; the party was sent to law, and if he recovered any thing by way of damages, this court entertained the suit."

(c) *Marlow v. Smith*, 2 P. W. 198.

(d) The view which has been here taken of the origin of doubtful titles is, it is conceived, grounded on considerations sufficiently obvious to render unnecessary any reference to authority: it may, nevertheless, be satisfactory to observe, that in one of the earliest cases on this subject (*Cooper v. Donne*, 4 Bro. C. C. 87,) the same view is manifestly taken by Eyre, Lord Commissioner, although it does not appear to have been adverted to in any of the subsequent cases. His Lordship observes, that "In suits for specific performance of contracts it is always in the discretion of the court whether they will decree on a specific performance, or not. In the particular case of a bill for a specific performance of a contract for the sale of an estate, where there are considerable difficulties on the face of the title, and there are no means of clearing them up, and no jurisdiction to bind the question, I think that is not the case for decreeing a specific performance."

ion of learned men against this title, I will not, nor, do I think it reasonable, that a court of equity should compel the purchaser to accept the purchase." This is the first reported case of a bill for specific performance being dismissed on the ground of a mere doubt as to a point of law involved in the title; and it is singular, that for the long period during which Lords Hardwicke and Northington presided over the Court of Chancery, not another of this description *is mentioned, although we have Sir W. Grant's authority for stating that this doctrine was repeatedly acted upon by Lord Hardwicke.^(g)

Lord Eldon has frequently referred to this doctrine in terms of disapprobation, although it may be said in a great degree to have grown up and attained its maturity under his decisions. By a lapse of memory, which is the more remarkable in a judge whose recollection was so extensive, and for the most part so accurate, the introduction of this doctrine of doubtful titles in the courts of equity, is ascribed by him to Lord Thurlow; and the case of *Shapland v. Smith*,^(h) (decided at [*14] *least half a century after *Marlow v. Smith*, which has been adverted to, and with which Lord Eldon must necessarily have been familiar,) has been repeatedly mentioned by him as the first case on the subject. In *Stapylton v. Scott*,⁽ⁱ⁾ his Lordship thus expresses himself:—"The habit of this court formerly was, not to refuse the decree for a specific performance, upon the ground that the title was doubtful. The court, relying on its own opinion in favour of the title, would not admit any doubt, detracting from the value of that opinion; and the notion was very generally entertained, that the true way of getting rid of the difficulty, arising from any doubt, was by an appeal to the House of Lords. The course has, however, varied entirely; and it has been held repeatedly that, though in the judgment of the court, the better opinion is that a title can be made, yet if there is a considerable, a rational doubt, the court has not attached so much credit to its own opinion as to compel a purchaser to take the title, but leaves the parties to law." Adverting to the same subject in *Jervoise v. The Duke of Northumberland*,^(k) he states the former law and the change in the following terms:—"The law [*15] *of the court has altered in my time. When I first began to practice the rule was this,—when the court had once determined that a party was tenant in tail or tenant for life, with an absolute power of ap-

(g) "It has been said, that every title is good or bad, and the court ought to know nothing of a doubtful title; but the court has adopted a different principle of decision. It was not first introduced by Lord Thurlow, but is at least as old as Sir Joseph Jekyll's time, and was repeatedly acted upon by Lord Hardwicke." Per Sir W. Grant, in *Sloper v. Fish*, 2 Ves. and Bea. 149.

(h) "The first instance is the case of *Shapland v. Smith*, (1 Bro. C. C. 75,) in which the single question between Baron Eyre and Master Hett was whether there was a use executed or not? and the case sunk down into this state, that with so much difficulty upon the title, a purchaser should not be compelled to take it." (Per Lord Eldon, in *Vancouver v. Bliss*, 11 Ves. 465.) In *Stapleton v. Scott*, 16 Ves. 274, he refers to the same case in very nearly similar words. "The first modern case of that sort," his Lordship there observes, "was, I believe, *Shapland v. Smith*, in which Master Hett differed from Baron Eyre, and the opinion of the former was confirmed by Lord Thurlow, who, however, felt the doubt so forcibly, that he refused a specific performance, and unquestionably in many instances since that time, it has been refused where there was reasonable doubt upon the title." See also *Jervoise v. the Duke of Northumberland*, 1 Jac. & W. 568, where his Lordship uses language very nearly to the same effect.

(i) 16 Ves. 272.

(k) 1 Jac. and Walk. 568.

pointment, or anything else that would enable him to convey a fee simple free of all charges and incumbrances whatsoever, it would act upon that opinion as incontrovertibly right. The old course used to be, when a party was dissatisfied with the judgment of the court, to compel him either to do as the court required, or appeal to the House of Lords; not that, that opinion was decisive, but it gave a sanction to the title, which would probably operate to the security of the purchaser. And I believe that the first case in which the rule was departed from, was that of *Shapland v. Smith*, and that the last case that went to the House of Lords, was one in which Mr. Morris, a King's Counsel, was plaintiff. The court since that time has almost gone the length of saying, that unless it was confident that if it had £95,000(*l*) to lay out on such an occasion, it would not hesitate to trust its own money on the title, it will not compel a purchaser to take it."

One or two passages in these statements are clearly erroneous, for it is manifest from what has been already observed, that the practice did not change *in Lord Thurlow's time, but long previously. [*16] It may also be reasonably questioned whether, as suggested [*16] by his Lordship, it was ever a common practice for the court to decide upon the title, and leave the purchaser to his remedy by appeal to the House of Lords, and the illustration which he has resorted to, does not help out his view of the case, because when it is "once ascertained that the vendor is tenant in tail, or tenant for life, with an absolute power of appointment, or any thing else which would enable him to convey the fee simple," there seems to be an end of all doubt as to the title, and therefore if there were an appeal it must have been on some other point than a question of title.(*i*) It seems also to be a fair deduction from the observations of Lord Eldon, which have been cited, that he had not formed a very clear conception of the reasons on which the doctrine of doubtful titles was founded; for if he had, it is scarcely conceivable that he should not have made some allusion to them, the topic being manifestly a favourite, and one on which he was *fond of recalling the recollections of a former period. And so far from think- [*17] ing it was in any degree dependent on the peculiar nature of equity jurisdiction, he simply appears to have regarded the change as in part arbitrary, and in part growing out of an increasing anxiety in the court to protect the purchaser.

In *Biscoe v. Perkins*,(*k*) Lord Eldon followed the old practice as above stated. The objection to the title in that case arose out of the question, "whether trustees to preserve contingent remainders joining in a recovery with the tenant for life and the first tenant in tail after he had attained twenty-one was a breach of trust," for if so the title was bad. Lord Eldon, although he considered the point not to be quite

(*l*) The amount of the purchase-money in the case then before the court. See *Stuart v. The Marquis of Bute*, 11 Ves. 666.

(*i*) It is difficult to understand the meaning of the expressions made use of by Lord Eldon, in *Jervoise v. the Duke of Northumberland*, to the effect that even the judgment of the House of Lords was not decisive, as to the question of title, but only gave a "sanction" to it, such as "would probably operate to the security of the purchaser," (1 Jac. & Walk. 568;) and in *Vancouver v. Bliss*, "they appealed and had not a title absolutely, indefeasible, but as good a warranty as could be procured." (11 Ves. 465.)

(*k*) 1 Ves. & Bea. 485.

clear, refused to let the purchaser off, adding, "I shall compel him to take the title unless he will reverse my opinion; that was formerly the course, instead of letting off a purchaser upon a doubtful title; and the purchaser then went to the House of Lords."^(l)

At common law, *doubtful* titles are unknown; there every title must be good or bad. In an *action by a vendor to recover [*18] damages for breach of contract, it is no defence for the purchaser to throw a mere cloud on the title; unless he can show a clear defect, he cannot resist the action on this ground. The reason of this distinction between the practice of a court of equity and of law, may be easily collected from what has been already stated, for all defects must arise, either on a matter of fact or of law, as to both of which a court of common law, has jurisdiction to decide conclusively. Hence the imperfect jurisdiction, which has led to the doctrine of doubtful titles in equity, does not exist in a court of law. Cases indeed there are, extending from the time of Lord Kenyon to our own in which judges at common law are reported to have adopted the principles and the language of courts of equity on this subject,—refusing on the one hand to sustain the vendor's action for damages for breach of contract, and on the other permitting the purchaser to recover back his deposit,—in cases where a doubt could be thrown upon the title.^(m) In all these cases, however, it is not going [*19] too far to say, that the courts have miscarried, *the judge there having no discretion to shelter himself under a doubt as to the law, but being bound by his oath, and by the very nature

(l) Ibid. 493. This point is now settled, it having been recently decided that it is no objection to a title, that it is founded on the destruction of contingent remainders. (*Hasker v. Sutton*, 2 Sim. & Stu. 513.)

(m) The following is a short *precis* of the cases previous to *Curling v. Shuttleworth*, (cited p. 20 :)—

Hartley v. Pehall (Peake's N. P. C. 178) was an action by the vendor to recover damages for breach of the contract; the purchaser resisted on the ground of a defective title, the question being, whether a certain covenant was or was not valid? Lord Kenyon refused to decide the point, saying "that he thought this a question of some nicety, but whether it was or not he thought it equally a defence to the action. When a man buys any commodity he expects to have a clear undisputable title, and not such a one as may be questionable at least in a court of law. No man is obliged to buy a law suit."

The same doctrine was recognised and acted upon in *Wilde v. Fort*, 4 Taunt. 341, where also it was held that the purchaser was entitled to recover his deposit, because it was doubtful whether a person under whom the vendors claimed was liable to account to the crown, and whether on the construction of a deed 30 years old, the wife of a party to that deed was barred of her dower; it was also held that the latter objection was not answered by evidence at the trial that the wife had died previously to the contract of purchase, for though the title of the dowress had accrued 30 years back, it was not clear that it had then ceased.

So in *Elliot v. Edwards*, (3 Bos. & Pull. 181,) where a person having sold certain leasehold premises to B, and in the assignment was a proviso that B should not assign over till the whole of the purchase-money was paid, and B and C covenanted for themselves, their executors, administrators, and assigns, to pay the money. Before the money was paid, the premises were sold by the sheriff to D under an execution: D paid a deposit, and covenanted to pay the residue of the purchase-money on having good a title; it was held that the non-payment of the purchase-money by B was a good objection to the title, and that D might recover his deposit in an action for money had and received. The principal question was, whether the covenant of B and C was merely a covenant in gross not running with the land, which was strongly insisted on behalf of the defendant, the auctioneer, or whether it created an equitable lien. Lord Alvanley, C. J., without giving any decided opinion, thought that it did create an equitable lien; and at all events he was of opinion that this was a *reasonable* objection, and that the purchaser was therefore entitled to recover his deposit.

of *his authority, to determine all matters of law which are incident to the proper settlement of the question between [*20] the litigating parties.

The true doctrine on this subject is stated by Sir V. Gibbs, C. J., in *Romilly v. James*,⁽ⁿ⁾ where this learned Judge thus expresses himself:—"It is said the plaintiff will have made out his claim to recover back his deposit if a cloud is cast upon the title. That is not so in a court of law; he must stand by the judgment of the court, as they find the title to be, whether good or bad; and if it be good in the judgment of a court of law, he cannot recover back his deposit. If he had gone into a court of equity, it might have been otherwise. I know a court of equity often says, this is a title which, though we think it available, is not one which we will compel an unwilling purchaser to take; but that distinction is not known in a court of law."

It would hardly seem to be necessary further to dwell on this point as respects the practice of courts of law, had it not been that the law, notwithstanding the very clear and forcible manner in which it is here laid down, was entirely misapprehended so recently as the case of *Curling v. Shuttleworth*.^(o) This was an action by a purchaser to recover the deposit on the sale of a policy of insurance, under a power given to a mortgagee, and the purchaser objected to complete, on the ground of a doubt, whether the power under which the sale was effected, [*21] *had not been extinguished or suspended by some subsequent dealings with the policy? It is plain that the only question the court had to consider was, whether the power was or was not extinguished or suspended, and so determine whether the vendor had or had not a good title? this plain and obvious course was not however adopted, the purchaser being allowed to recover his deposit, on the ground of there being so much doubt on the title, that he ought not to be compelled to accept it. *Tindal, C. J.*, is reported to have said, "That where upon a sale there is such doubt upon the vendor's title as to render it probable the purchaser's right may become a matter of investigation, the court will not compel him to complete the purchase. Here, according to the conditions of sale, the policy was to be sold under a power. The vendors, therefore, should have shown an unquestionable power, for there are no means of calculating the compensation to be allowed in case of any mistake. Supposing the power to have been only suspended, there may be a candid doubt how far that suspension may be considered to operate in a court of equity; and if there be a reasonable degree of doubt, this court will not expect the purchaser to proceed." *Mr. Justice Parke* concurred in the same opinion, declaring that they "ought not to drive parties into a court of equity,"^(p) and *Justice Burrough* added, "if [*22] there be reasonable doubt as to a title, we cannot compel a party to take it."

These opinions, obviously arising out of an imperfect, if not erroneous, view of the distinct and peculiar character of the jurisdiction at law and in equity, were soon corrected; for in *Boyman v. Gutch*,^(q) which fol-

(n) 6 Taunt. 274; 1 Marsh. 592.

(o) 3 J. B. Moo. 368. 6 Bing. 121.

(p) *Quære*, how the decision of a point of law could have the effect of driving the parties into a court of equity?

(q) 7 Bing. 379.

lowed shortly after, which was also an action by the purchaser to recover his deposit, the purchaser objecting that the vendor had no authority to sell the property in question, it was insisted on the behalf of the plaintiff, that it was at all events *doubtful*, whether he had such authority, and if so, that the court would not compel the purchaser to take a questionable title, and thus incur the hazard of purchasing a law-suit. *Curling v. Shuttleworth*, was strongly pressed, but in vain, the judges, admonished by a hint from the Court of King's Bench,^(r) reverted to the sound practice, and did their duty, by determining the question of law, on which the doubt was raised:—"Whether," said the Chief Justice, "a court of equity would compel a purchaser to accept such a title is a question, which we are not called upon to determine. All that we profess to determine is, the construction of the deed, which appears to us to negative the allegation above set forth in the declaration." This decision brings back the common law doctrine to its true foundation, and has

[*23] probably set at rest the class of *cases which recognise the existence of doubtful titles at common law. It is tolerably obvious, that the judges, in these cases, had suffered themselves to be misled by some fancied analogy to the rule in equity;—forgetting, apparently, on the one hand, that on questions of this kind the Lord Chancellor's jurisdiction is merely equitable, and that he has no authority to bind the parties upon a mere point of law; and, on the other, that the court in which they were sitting is the peculiar jurisdiction for such matters; and that they were themselves the depositaries of the law, and the proper and peculiar tribunal for the settlement of all new, litigated, or doubtful questions.

Hence then, as it appears that the reason, why *doubtful* titles are not recognised in courts of law, is because these are the proper and peculiar tribunals for the decision of all legal questions; and as the House of Lords has, in its appellant character, both a legal and equitable jurisdiction; and its decision on all points of law and equity submitted to its consideration are final and conclusive, and to be reversed only by an Act of Parliament, it would seem, that as a judicial tribunal subject to none of the infirmities of the court of chancery, and having all the powers incident to a court of law for binding the rights of parties, it would not be competent for the House of Lords, *to dismiss an appeal from

[*24] an order of the court of chancery on a question of title, merely because there was a doubt on the law; but that it ought to determine what the law is, and to affirm the decrees or remit the cause accordingly. This, however, seems not to be so, it having been recently held, that where there is a reasonable doubt as to the title, it is competent for the House of Lords to dismiss the appeal.

This was decided in *Blosse v. Clanmorris*.^(s) In that case the point was, Whether a reversion vested in the crown by forfeiture, and not by original grant, could be barred by a recovery? which Lord Eldon put to the House in this form,—“Whether the doctrine of law upon that point could be stated to be so clearly against the crown, that a purchaser ought to be compelled to take an estate with such a title? He said that the

(r) See what was said by Alderson, J., in *Boyman v. Gutch*, 7 Bing. 390.

(s) 3 Bligh, 62.

law, as to estates tail, under the 34th Hen. VIII. was clear and settled, but not so with respect to such a reversion as now was in question; and that he could not advise the House, sitting as a court of equity in appeal, to hold a purchaser to a contract in a case where it could not be stated, as a matter free from doubt, whether the reversion had been barred by the recovery." Lord Redesdale, after adverting to the practice of divesting the reversion of the crown by Act of Parliament, to enable the tenant in tail to make an effectual recovery, as being important evidence of the state of *the law, proceeds thus;—"General opinion [*25] is certainly against the title. In this case it is not necessary to come to any precise decision on the point. It is sufficient, on the question now before the House, if the law be doubtful. A purchaser has a right to require a marketable title; and this title, it must be admitted, rests on a point of law, which is at least doubtful."

It must be admitted to be a singular fact, that the highest judicial tribunal in the realm, the supreme court of appeal, the House of Lords, assisted by two Lord Chancellors, with power to call in the twelve judges of England for their opinion, should be unable to decide a simple point of law!

Notwithstanding this decision there is good reason for contending, on the grounds already stated, that the House of Lords ought to know nothing of doubtful titles,—its powers being co-extensive with the jurisdiction both of courts of law and equity. A judge sitting in equity may be excused for acting, on the indolent pretext that the title is doubtful; because if he decide, he decides on a question which is external to the proper business of his court, and his judgment is liable to be reversed by a tribunal to which such business properly belongs. The House of Lords can put in no such plea, because its decision cannot be exposed to such a risk, inasmuch as it finally and conclusively binds the rights of all the parties to the suit,—and constitutes part of the law of the land, till changed by an Act of *the whole Legislature. It is therefore submitted, that the case of *Blosse v. Clanmorris* will not [*26] afford a principle. It may perhaps be reasonably expected that the practice acted on in this case will not continue to prevail, prejudicial as it is to the parties, and derogatory to the wisdom and the authority of that high tribunal. A recurrence to the principles which have been here stated, and a more enlarged and comprehensive consideration of the subject may possibly lead to the re-establishment of a practice more congenial with the spirit of justice, and the due administration of the law.(t)

The doctrine then of *marketable* titles is purely *equitable*, and its

(t) That the notion which it has been here attempted to combat, had never entered into the mind of Lord Eldon, till a very late period of his judicial career, and when the peculiar habits of a court of equity may be presumed to have usurped an undue influence over his mind, can hardly be questioned, when we recur to the language he was in the habit of using on this subject. In speaking of the old practice (as he represents it) of the court below relying upon its own opinion, and then if the party was dissatisfied, leaving him either to acquiesce or go up to the House of Lords to have his opinion reversed, he never for once suggests the possibility of their Lordships doubting upon the law; but seems to take it for granted that they would either affirm the repeal or remit the cause; that is to say, however doubtful the law might be, that they would decide the question submitted to them, either one way or the other.

[*27] growth and present condition is to *be found in cases of comparatively modern date, there not being half-a-dozen reported decisions upon the subject previous to the time of Lord Eldon. Whether it would not have been wise to have arrested the progress of such a doctrine,—a doctrine to which must be ascribed a great deal of the difficulties of modern conveyancing, and the difficulty and expense of investigating titles at the present day,—it is now too late to inquire. That no one perceived more clearly, or felt more strongly the various evils resulting from it, than Lord Eldon, is sufficiently manifest from the language he has on various occasions employed with reference to this subject and its collateral branches.^(u) Yet with the fullest consciousness [*28] of *these evils, he made no attempt to suppress or remove them; but went on from day to day, condemning the doctrine and lamenting its consequences, while he was strengthening its foundation, and extending in every direction new branches and ramifications of it.

One of the first and most obvious results of this doctrine is, the minute and curious accuracy with which it has become necessary to investigate the title to real estate; it being the duty of the conveyancer, when advising upon the validity of a title on the behalf of a purchaser, to see that his client gets a marketable title,—that is to say, a title so free from every difficulty either as to matter of fact or law, that on a re-sale an unwilling purchaser shall be unable to raise any question, which may [*29] appear *to a judge sitting in equity so doubtful, that a title involving it ought not to be enforced. The only way for a practical lawyer to meet a doctrine like this, is by stating every objection; however apparently minute, or however unimportant he may deem it, because what may or may not appear to the individual who happens to preside over the court of equity, a “rational doubt,” is obviously a thing so very vague and indefinite, that counsel having to advise on title can only discharge their duty by pointing out every objection, however trivial; by directing enquiries on every matter as to which there is the

(u) Thus in *Vancouver v. Bliss*, (11 Ves. 464.) his Lordship thus expresses himself:—“It appeared before the master, that this is not an abstract of such a title as this court will compel a purchaser to take. I am sorry to use that expression, recollecting a period when no such words were used; when it was the office of the court to decide, whether the title was good or not; and it was thought better, that the dry rule should prevail, that if the title was good, the purchaser should take it, than that the court should speculate on the point, whether there was more or less difficulty in the title, and say in one case he should take it, in another, he should not. The old course was, that if the parties were afraid of the decision, they appealed; and had, not a title absolutely indefeasible, but as good a warranty as could be procured. The departure from that course has been attended with great mischief. It is scarcely possible to represent the difficulties, that have arisen from it; especially in a period, when persons, under the description of land-jobbers, are going about looking for these things; and persons improvidently enter into contracts with them. Whenever a contract is made for the purchase of land, though no doubt has ever been entertained upon the title, no one thinking of disputing it, if the purchaser has a good bargain, he overlooks these objections; but, if he finds, he cannot sell the estate as well as he wished, or cannot enjoy it to his satisfaction, the first thing is, that the abstract goes to some one for the express purpose of finding out objections; and opinions are given on both sides. I feel great concern for the owners of this sort of property. The consequence is not only the misery arising from the uncertainty, whether that, which they have been enjoying with happiness, and upon which their families are to subsist, is their property; but it is an invitation to all, who fancy they may have an interest in it, to make an attack. There cannot be much doubt therefore, which is the best rule; but the course that now prevails, has been established so long, that I have not authority to alter it.”

barest probability that some defect might be discovered; by requiring the fullest satisfaction on all matters of legal construction, on which it is possible that two lawyers may think differently; and by calling for legal, or at least satisfactory, evidence, on every material fact, involved in the title for a period of sixty years at least.

If, therefore, objections be frequently raised, and enquiries suggested on an Abstract which appear to be unnecessary, it should always be borne in mind that these objections and enquiries are suggested in order that the purchaser may have a marketable title,—and if on these points an over-scrupulous degree of caution is sometimes manifested by counsel, this is not altogether to be ascribed to “the doubts”^(v) of conveyancers, ‘great *Pyrrhonists’ though they be, but partly also to those [*30] high tribunals which have permitted trivial doubts to influence their decisions, and, according as they more or less prevailed, granting, or refusing the interposition of their high authority in the administration of that important branch of their jurisdiction which relates to the enforcing contracts for sale.

From what has been stated, it will not be difficult to collect a general notion of what is understood by a marketable title, and by way of general definition, it may now be more particularly observed that in a court of equity “a title is unmarketable, when a fair and reasonable objection appears on the abstract, although the master report for the title, and although the opinion of the court may incline in its favour.”

What is such a fair and reasonable objection, as will induce the court to pronounce the title unmarketable, is purely a question for its own discretion,—a discretion which, even with the same judge, does not always lead to the same conclusion, as a very cursory review of the cases would abundantly testify, and which therefore when exercised by different judges, it may be reasonably presumed would lead to still greater diversities of decision. What in any given instance shall be enough of difficulty to induce the judge to doubt, will oftentimes depend less on the view he takes of the law than on his intellectual habits and mental constitution; on the state of his temper or the extent of his knowledge. The same *judge at different periods of his life, or in different states of health, and with precisely the same means of [*31] coming to a just conclusion, would arrive at very different determinations. At one period, pregnant with energy he would not suffer his decision to be impeded by minor difficulties; at another time, sinking under the infirmities of age or ill health, he would be content to reach a point where a question could be fairly raised, and there sheltering himself under the ‘rational doubt,’ which his own fancy or infirmities had created, would dismiss the suitors from his presence, and release himself from the research and responsibility necessarily incident to a conclusive settlement of the question.

(v) “In all cases where conveyancers have their doubts, and great Pyrrhonists they are.” Per Lord Northington, *Pelham v. Gregory*, 1 Eden, 522.

[*32]

*CHAPTER II.

OF SUITS FOR THE SPECIFIC PERFORMANCE OF AGREEMENTS FOR THE SALE OF LAND.

The object of this chapter is to bring together, and ascertain the present state of the law relative to suits for the specific performance of agreements for the sale of land. In doing so, it is proposed, first, to consider the effect of an agreement entered into for the sale of an estate,—second the origin and nature of the equitable jurisdiction for enforcing such agreement,—then the mode of pleading such agreement,—the nature of the issues, or questions raised in the suit,—the principles on which they are determined,—the proceedings as to the reference of the title to the Master, on exceptions, and on further directions.

SECTION I.

Of the effect of an Agreement for the sale of Land.

It being a general principle of equity, that what is agreed to be done for valuable consideration shall be considered as done, the consequence [*33] is, that after a contract has been entered into for the sale of land, *the vendor becomes a trustee of the land for the purchaser, and the purchaser a trustee of the money for the vendor. So that if the purchaser die before the contract be completed, he may devise the estate contracted for, or if he make no will his heir at law may call for a conveyance of the estate to himself, or for the purchase-money to be paid to him out of the personalty; on the other hand, if the vendor die, his executors, or other personal representatives, may require the estate to be sold, and the produce applied, pursuant to the disposition of the personal estate, if he have made a will, or distributed among his next of kin, if he have not made one. In order, however, to constitute such conversion, the contract must be valid, and such as can be enforced in equity at the death of the party whose heir or personal representative claims the benefit of it. And, therefore, in a recent case, *(w)* where a purchaser made his will after the contract, in pursuance of which, he, after the date of his will, took a conveyance, yet it was held that the estate did not pass, in consequence of the contract not sufficiently evidencing the terms, and, therefore, not capable of being enforced in equity.

When, therefore, the heir-at-law of a deceased purchaser, files his bill for a specific performance of the contract, the question is Whether, at the death of the purchaser, a contract existed, by which he was bound, and [*34] which he could be compelled to *perform; for that alone can give the heir-at-law a right to call upon the executor to apply the personal estate in the completion of the purchase. It is perfectly immaterial that the vendor is ready and willing, and that the executors do not object to perform the contract, if the personal representative can show that the vendor has no right to call for its performance. *(x)*

(w) *Rose v. Cunynghame*, 11 Ves. 550. As to the effect of the contract during the interval when the title is in dispute, see *Ackland v. Gaisford*, 2 Madd. 31.

(x) *Buckmaster v. Harrop*, 7 Ves. 341.

The same principle is equally applicable to the devisee, as to the heir-at-law of the purchaser; and, consequently, if the vendor could not have enforced the contract as against the devisor,—whether this arise from delay, coupled with other circumstances which would have been a bar to a bill for specific performance against the purchaser at the period of his death,(y) or from the incompetency of the vendor to make a good title, or any of the other causes, which would prevent a court of equity from enforcing it,—the devisee is not entitled to have the benefit of the contract, and has no claim upon the personal estate, either for the purchase-money, or to have another estate purchased, or to have the purchase completed notwithstanding the defect of title. It is clear that the right of the personal representatives of the vendor to have the contract of sale completed, depends on exactly the same considerations; and that, if the purchaser could not at the time of the vendor's decease have enforced the contract against him, they will not be entitled to a sale.

*The effect of a valid contract being then to convert the property, and to render the purchaser the owner of the land in [*35] equity, it follows that if the estate sustain any prejudice between the date of the contract and that of the conveyance, he must bear the loss, and that if any benefit accrue he will be entitled to it.(z) If at the date of the contract the purchaser was in the occupation of the land, as tenant at will, the equitable ownership thereby acquired determines the tenancy;(a) if he was possessed of a term, that term immediately becomes attendant upon the inheritance;(b) and if the purchaser had, previously to the date of the contract made his will, disposing of all his personal estate, the contract, as to this term, operates as an implied revocation, and the legatees will not be entitled to it.(c) And the relation of vendor and vendee when acquired by conveyance of the inheritance, puts an end to the covenants, though ever so large and general, which existed between them as lessor and lessee.(d)

If a man has by will disposed of an estate, which he has contracted for, and afterwards takes a conveyance of the legal estate, it will, according to the recent decisions, depend upon the form of that conveyance, *whether it shall, or shall not, operate as a revocation. If he simply clothe himself with the legal estate pursuant to [*36] the terms of the contract, this will be no revocation; if the contract merely stipulate that the lands shall be conveyed to the purchaser in fee, and he takes a conveyance to uses to bar dower, this is a revocation: this point was so decided in *Rawlins v. Burgess*,(e) where the question is thus argued by Sir Thomas Plumer:—

“This contract, under which the devisor became equitable owner of the estate, and was to have a good estate in fee simple conveyed to him in the following September, is silent as to the form of the conveyance, except by those general terms. The conveyance, therefore, which this court would have directed must have been of a pure unqualified estate in fee; the contract pointing at nothing else. If the vendor had tendered

(y) *Whittaker v. Whittaker*, 4 Bro. C. C. 31.

(z) *Paine v. Meller*, 6 Ves. 349; *Harford v. Purrier*, 1 Madd. 532; *Revel v. Hussey*, 2 B. & B. 280.

(a) *Daniels v. Davison*, 16 Ves. 252.

(b) *Capel v. Girdler*, 9 Ves. 509.

(c) *Ibid.*

(d) *Paton v. Brebner*, 1 Bligh. 69.

(e) 2 Ves. & Bea. 387.

this conveyance the purchaser would not have been bound to accept it; but might have objected that the estate was modified in a manner different from his contract. If, then, a conveyance in fee would have been a good execution of the contract, can this be so? Can an estate thus modified by the introduction of a power of appointment to be executed only before two witnesses and a trustee interposed, be represented as the same estate, a mere substitution of the legal for the equitable right, and [*37] therefore no revocation, *when the very slight alteration of the devisor's disposing power in *Tickner v. Tickner*, (*f*) had that effect?

"The argument that the beneficial interest remained the same, would overturn that case. The conclusion must be that there was some object beyond the mere completion of the contract by taking the legal estate; the case, in that respect, resembling *Brydyes v. the Duchess of Chandos*, (*g*) and differing from *Williams v. Owens*. (*h*) The consequence is that the estate when the purchaser died, was changed, it was no longer the same that he had by the contract; and, consistently with all the authorities, the effect is a revocation."

It must be admitted, that the distinction here taken is very fine, and yet, though this decision has not given entire satisfaction, it seems difficult to find any solid reason for impeaching it. In order to avoid the consequence of this doctrine the agreement should always stipulate that the conveyance shall be made to the purchaser in fee, or to such uses as he shall appoint, which would clearly include the case of a conveyance to uses to bar dower.

The vendor, it has been seen, is a trustee for the purchaser till the completion of the purchase by actual conveyance; if he die before it be [*38] completed his heir-at-law becomes a trustee for the same purpose; *but if, after the contract, he make his will, disposing of all his real estate, a question of great difficulty sometimes arises, whether the legal interest in the estate contracted to be sold, passes to the devisee, or descends upon the heir-at-law. In cases of naked trusts, the rule is now well settled, that under a general devise, a trust or mortgaged estate will not pass, if an intent appear to treat it in a manner inconsistent with the nature of trust property. (*i*) It would probably have been a very convenient decision to have held that the same rule applied to vendors, as constructive trustees for the purchaser, although it must be admitted that the constructive trusteeship of a vendor, and an actual trusteeship, are, in many respects, materially different.

The way of reasoning with respect to a trust estate has been this;—that, the party having no beneficial interest, it can hardly be considered his for the purpose of disposition; he, has no right to dispose of it, except by the direction of his *cestui que trust*, or for the objects for which it was entrusted to him; and, therefore, when he makes a devise inconsistent with the trust, to suppose he meant it to pass, is to suppose that he was taking upon himself an act of injustice, which the court will not presume, and therefore says, that he did not mean to include it, and, consequently, that it descends upon the heir-at-law. The same

(*f*) 6 Ves. jun. 600, cited.

(*g*) 2 Ves. jun. 417.

(*h*) 2 Ves. jun. 595.

(*i*) Lord Braybrooke v. Inskip, 8 Ves. 417.

reasoning applies to some extent to the constructive trusteeship *of a vendor. The contract to sell is, in equity, a [*39] disposition of the estate and a parting with his right and dominion over it. Therefore to suppose him intentionally to devise, for purposes of his own, that which he cannot so dispose of, is open, in some measure, to the same objections as apply to the case of a naked trustee. There is, however, this distinction between the two cases; that the one never had more than the legal estate; the other at one time had both the legal and equitable ownership, and may have it again, if, owing to a defect of title or any other cause, the agreement should ultimately fail of being carried into effect. And, it is further to be observed, that though, for most purposes, the purchaser is, in equity, considered to be the owner of the estate, yet there are material qualifications to that proposition. (k) Thus, before payment of the purchase-money, he may be restrained from cutting timber; (l) he is not entitled to the possession unless stipulated for,—the vendor has a right to retain the estate in the mean time, liable to account if the purchase be completed, but not otherwise. The ownership of the purchaser is inchoate and imperfect, it is in the course of passing to him, but it has not yet passed. Pending the suit for specific performance, very delicate questions may arise as to the equity of enforcing the contract; and, supposing these to be got over, it is settled that the vendor may complete the title while *under investigation in the [*40] master's office and until the title is complete the purchaser is not bound. Supposing, therefore, the vendor to make his will, pending these negotiations, by which he disposes of all his real estate, at a time when the estate contracted to be sold may be thrown back upon his hands, it would be a difficult thing to say that all the interest he had in this estate did not pass. It is obvious that until the completion of the contract he has an interest in this estate,—why then should not this interest pass in a devise affecting to dispose of *all* his real estate? This is a very different case from that of “a naked trustee without a remnant of property in the estate;” and the reason against supposing a trust estate to pass by the will, arising from the apparent fraud of such a disposition, clearly does not apply to a vendor who has an actual interest in the land until the completion of the contract, and who may, in fact, become again the complete owner in case that contract should not be completed.

Accordingly, in the late case of *Wall v. Bright*, (m) where a person had contracted to sell his estate, and afterwards before it was conveyed, before the purchase-money was wholly paid, (n) or the period arrived for the payment of the rest, while the purchaser was paying interest for it, and when the possession had not been given up, the vendor made his will, devising all his real estate to trustees to *sell, Sir J. Leach, V. C., held, that the estate contracted to be sold passed [*41] under this devise, and, consequently, that the devisees in trust were competent to convey the legal estate to the purchaser.

Perhaps it is not too much to say, that the doctrine in this case goes the length of establishing, that where a vendor makes a will, disposing

(k) *Rawlins v. Burgis*, 2 Ves. & ea. 387.

(l) *Paine v. Moller*, 6 Ves. 349.

(m) 1 Jac. & Walk. 499.

(n) That is, part being paid, and a considerable part, 9,000*l.* out of 10,000*l.* remaining due.

of all his real estate, after having entered into such a contract, such interest as he had in the estate contracted to be sold passes to the devisees, unless there be something in the terms of the devise which clearly shows the testator's intention to exempt that estate from the operation of his will.^(o)

The benefit of the contract will descend upon the heir-at-law of the purchaser, or the personal representative of the vendor, although the election to complete the contract rest only with one of the parties. This was decided by Lord Kenyon in *Lawes v. Bennett*; that case, according to a note of Lord Eldon's, was as follows:—"A person named Witterwonge, in 1758, demised to Douglas for seven years, with a covenant, that if after the 29th September, 1761, and before the 29th September, 1765, Douglas should choose to purchase the inheritance for 3,000*l*. Witterwonge would convey accordingly. Witterwonge died in 1763, no election having been then made by Douglas; and left all his real estate to John Bennett, and all his personal estate to Bennett and his sister, equally as [*42] tenants in *common. In 1765, before the 29th September, Waller, who had purchased the lease and the benefit of the agreement from Douglas, called upon Bennett, the devisee of the real estate, to convey upon payment of £3,000. The bill was filed in 1781, by Lawes, the husband of Bennett's sister, against the personal representative of Bennett, the brother, claiming a moiety of the £3,000 and interest;—and Lord Kenyon made the decree accordingly, observing that though Witterwonge could not have compelled Douglas to purchase, the money was at the time of the election, declared to be considered as the personal estate of the testator, and did not belong to the devisee of the real estate." Lord Eldon, though he does not appear to have entirely approved of this decision,^(p) nevertheless he followed it in *Townley v. Bedwell*,^(q) which was exactly the same *in specie*, saying, that "where there is a decision exactly in point, it is better to follow it;" holding that until the option was declared, the rents belonging to the heir-at-law of the vendor, but afterwards to the purchaser, who from that time must be charged with interest, which money and interest were personal estate of the testator, and went to his personal representative.

[*43]

*SECTION II.

Of the Principles on which Agreements are enforced.

With respect to the jurisdiction exercised by courts of equity, in decreeing specific performance of agreements, it has been justly observed^(r) that there is ground for much doubt whether, in their determinations on this subject, they have always considered what was the original foundation of decrees of this nature; and that from habit, rather than on any sound principle, decrees of this kind have been carried to an extent which has tended to injustice. The original foundation of these decrees was

(o) And see *Knollys v. Shepherd*, 1 Jac. & Walk. 499, cited.

(p) "That case was very much argued, and I do not mean to say that a great deal may not be urged against it." 14 Ves. 596.

(q) 14 Ves. 590.

(r) Per Lord Redesdale, in *Harnett v. Yielding*, 2 Sch. and Lef. 553.

simply this, that damages at law would not give the party the compensation to which he was entitled; that is to say, would not put him in a situation as beneficial as if the agreement were specifically performed. Hence courts of equity have refused in a variety of cases, to interfere, where, from the nature of the case, the damages at law would be commensurate with the injury sustained: they have refused, for instance, to enforce agreements for the purchase of stock, because it is plainly immaterial to the party, where or from whom the stock is purchased, provided he receives the money that will purchase it. "One man's stock," to use the words of Parker, C. J., "being as good as another man's." [*44]

*These cases show the principle on which courts of equity [*44] first interfered; but it has also been constantly held that the party who comes into equity for specific performance, must come with perfect propriety of conduct, otherwise he will be left to his remedy at law. He must also show, that in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do; otherwise a consequence would be produced, that quite passes by the object of the court in exercising the jurisdiction, which is to do more complete justice, than can be had at law; for if a party should be decreed to do an act, which he is not fully authorised to do, he would be exposed to a new action for damages at the suit of the person injured by such act. On this ground, if a bill be filed for a specific performance of an agreement by a man who appears to have a bad title, he is not compellable to execute it, unless the party seeking performance, is willing to accept such a title as he can give; and that only in cases where an injury would be sustained by the party plaintiff, in case he were not to get such an execution of the agreement as the defendant can give,—one reason for which is, that it would be not only laying the foundation of an action at law, in which damages may be recovered against the party, but also that it is by possibility injuring a third person, by creating a title, with which he may have to contend.

*When either party to a contract for the sale and purchase of an estate refuses to complete, the other has two remedies; [*45] he may proceed at law for damages for breach of contract, or he may file his bill in equity for the specific performance of it. Which of these modes is to be adopted will depend upon the object sought to be attained; if he want damages he must go into a court of law, if he wish to have his contract performed *in specie*, he must seek that relief in a court of equity.

It may be proper to consider the question which at one time was a good deal discussed,—whether a court of equity can give damages? The first case, in which the point was expressly raised, is *Greenaway v. Adams*; (r) the Bill prayed the specific performance of an agreement to assign a leasehold interest in a public house, or in case the defendant could not make a good title, that he might be decreed to refund the deposit with interest, and make satisfaction for the loss sustained by the plaintiff for non-performance of the agreement, and that an issue or a reference to the master might be directed to ascertain what loss the plaintiff has sustained. After this agreement, and pending some nego-

tiation which arose out of an objection to the title, the defendant parted with the lease, to another person, without notice, and thus rendered himself incapable of performing the contract: the question then rose, whether the plaintiff could have the alternative, *prayed in his bill, [*46] (that is) damages for non-performance. Sir W. Grant, M. R., addressing himself to the question whether damages could be given, says,—“That is contended for on the authority of *Denton v. Stewart*;^(s) that case is so shortly stated in any account of it that I have seen, that it is impossible to collect distinctly the principle upon which it was decided. It may be very probably *from that defect, that I [*47] have ever entertained any doubt upon the principle of that case. The party injured by the non-performance of a contract, has the choice to resort either to a court of law for damages, or to a court of equity for a specific performance. If the court does not think fit to decree a specific performance, or finds that the contract cannot be specifically performed, either way I should have thought there was equally an end of its jurisdiction; for in the one case, the court does not see reason to exercise the jurisdiction; in the other, the court finds no room for the exercise of it. It seems that the consequence ought to be that the party must seek his remedy at law. However, the case of *Denton v. Stewart* is a decision in point against that proposition; and the *species facti* is precisely the same as in this case; for in that the inability of the party to perform the contract grew out of an act done by the party, after the contract had been entered into. In that case how far Lord Kenyon meant the principle to extend, I do not know; but it is clear, he thought, this court ought to give damages; and in my opinion there is no difference in principle, whether the damages are to be assessed by an issue, or a reference to the master; for the question is upon the principle, whether the court can give the party relief in that way. Notwithstanding these doubts, in a case precisely the same as that, I shall yield my doubts to the authority of Lord Kenyon, and will follow the course his Lordship took. Probably, if I had the benefit of seeing the statement and development of the *principle upon which he acted, I should be [*48] perfectly reconciled to it. I give credit to the decision, though so shortly stated, as having proceeded upon a proper principle. Upon the whole, I think myself bound to follow the authority of that

(s) 17 Ves. 276, n. from a MS. of Sir S. Romilly; but more fully and apparently more accurately reported in 1 Cox, 258. This was a suit for specific performance of an agreement to assign a lease, the defendant afterwards assigned the lease to another person for valuable consideration without notice, and thereby put it out of his power to perform the agreement. Lord Kenyon, M. R., on the ground apparently of the “defendant having acted so dishonestly,” referred it to the Master, “to enquire what damages the plaintiff had sustained by the defendant not performing his agreement, and decreed that the defendant should pay the plaintiff such damages so to be ascertained, with the costs of the suit.” “Justice,” as was observed by Sir S. Romilly *arguendo*, “was certainly done by the decree, but it ought to have been forgotten the instant it was pronounced,” (17 Ves. 277.) Lord Eldon observes, “the defendant had it in his power to perform the agreement, and put it out of his power, pending the suit; this case, if not to be supported upon that distinction, is not according to the principles of the court.” Again, in *Blore v. Sutton*, (3 Mer. 248.) Sir W. Grant, adverting, probably, to the observations of Lord Eldon in *Todd v. Gee*, cited in the text, says, “the competency of a court of equity to give damages for the non-performance of an agreement, has, notwithstanding the case of *Denton v. Stewart*, been questioned by very high authorities. In that case, however, the plaintiff was guilty of a fraud in voluntarily disabling himself to perform his agreement, and had an immediate benefit from the breach of it.”

case; as having never been over-ruled by any subsequent decision. I shall therefore make precisely the same decree. I think the master just as competent to decide this as a jury. It must consist purely of pecuniary compensation."

In *Gwillim v. Stone*,^(t) the bill was filed to have the agreement delivered up, on the ground of the defective title of the defendant, and that compensation might be made to the plaintiff for the loss he had sustained by the defendant's non-performance of the contract. A doubt being intimated at the bar whether the plaintiff was entitled to have a decree for delivering up the contract, and also an enquiry before the master as to the injury sustained, Sir W. Grant adverting to the preceding cases said,—that in those cases the object of the bill was a specific performance; that here the bill was of a different nature, asserting from the first, that the defendant could not make a good title: that it was more proper for an action, and that the equitable relief would be obtained by a decree to deliver up the instrument. Sir S. Romilly, for the plaintiff, accordingly waived the enquiry, and took a decree without prejudice to the action. In considering the case it seems impossible to find in the difference *here taken, any sound principle of distinction from the preceding cases,—for if a decree for relief in the nature of [*49] damages be proper, on a bill for specific performance, where the defendant has disabled himself from completing,—equally proper would it seem to be on a bill to have the contract delivered up, on the ground of the defendant's inability to make a title. It seems reasonable, therefore, to conclude, that Sir W. Grant availed himself of this very delicate distinction merely to get out of the precedent established in *Denton v. Stewart*, from a conviction that the decision in that case could not be supported on any sound principle, and therefore it was not to be followed where the circumstances were not exactly the same.

In *Todd v. Gee*^(u) the bill prayed a specific performance, or if the defendant should be unable to perform it, then satisfaction for the damages sustained by non-performance. Lord Eldon, adverting to the cases which have been mentioned, said, on the hearing of the argument, "My opinion is, that this court ought not, except under *very special circumstances, as there may be*, upon a bill for the specific performance of a contract, to direct an issue or a reference to the master to ascertain the damages. That is purely at law. It has no resemblance to compensation." And afterwards on giving judgment: "My opinion upon the question is confirmed by reflection. Except in very special cases, *it is not the course of proceeding in equity to file a bill for specific [*50] performance, praying, in the alternative, that if the agreement cannot be performed, the court will direct an issue or an enquiry before the master, with a view to damages. The plaintiff must take that remedy, if he chooses it, at law: generally, I do not say universally, he cannot have it in equity."

In *Clinan v. Cooke*,^(v) the bill was filed for the specific performance of an agreement to grant a lease, and in case it should appear by the defendant's answer that he had put it out of his power to make a lease pursuant to the agreement, that he should be decreed to make compensation. As to the latter part of the prayer, it was stated at the bar that,

(t) 14 Ves. 128.

(u) 17 Ves. 273.

(v) 1 Sch. and Lef. 25.

that relief is to be sought at law and cannot be obtained in equity, to which Lord Redesdale is reported to have assented.

It would seem, indeed, from some expressions of Lord Eldon, that there may be such special circumstances as would induce the court to give relief by way of damages; but it is very difficult to imagine such a case, and none such occurs in the books except those which have been adverted to. Sir W. Grant seems clearly to have thought, that in no case could equity give damages; and Lord Eldon, although he admits the possibility of a case arising in which the court would give relief in the nature of damages, has suggested no such case, and therefore calling [*51] to *mind his habit of copious illustration, it may be fairly presumed, that the whole range of his research and experience had furnished no such case to him.

The result then at which we arrive is this, that as a court of law cannot give specific performance, so neither can a court of equity give damages.

In all suits for specific performance there are two issues;—

The first issue to be determined being, whether the contract be valid, and such as in equity and good conscience ought to be carried into effect,^(w) and accordingly the decree is always prefaced with a declaration that the agreement ought to be performed. This issue is the only question to be tried at the hearing of the cause.

The second, which is a collateral or secondary issue, though for the most part the only point in question between the parties is,—whether the vendor can make a good title? which is tried, in the first instance, by a reference to the master, from whose opinion, if either party be dissatisfied with it, his objections are brought before the court for its decision, by means of exceptions to the report; and then, according to the result of that decision, the court will either decree the contract to be carried into effect, *or send the report back to the master to [*52] review it, or dismiss the bill, or allow the exceptions to stand over, according to the exigency,—of all which modes of dealing various instances will be found in the following pages.

In a suit for specific performance therefore, the first point to be determined, is the goodness and reasonableness of the contract; for if the contract itself be invalid, or for any other reason such as a court of equity will not enforce, it is plainly immaterial whether the title be good or bad. The practice, therefore, which was adopted in a recent case,^(x) not reported, some notice of which will be taken in a future page, of having a reference to the master as to the title, before the question as to the contract is disposed of, was clearly erroneous. In that case, after very extensive inquiries upon the title, the cause came back for the decision of the court on the question, whether the contract was good or not, the contracting party being a married woman, living apart from her husband, and having a large separate estate, upon which Sir J. Leach held that she

(w) *Blyth v. Elmhirst*, 1 Ves. & Bea. 2.

(x) *Chester v. Platt*, MS. The reference in this case was to enquire “whether the plaintiff could make a good title without prejudice to any question as to the contract?”

could not contract, and consequently all the enquiries in the master's office, which had been conducted at a great expense, were entirely thrown away.

Hence then every suit for specific performance embraces two principal questions, the first, in reference *to the *validity and equity of the contract*, comprising that portion of the suit, which [*53] extends to the hearing of the cause; the second, in reference to the *marketableness of the title*, which is determined in the first instance in the Master's Office.

SECTION III.

Of what shall constitute an Agreement.

In order to sustain a suit for specific performance, the contract, on which the suit is grounded, must on the one hand be in writing conformably to the provision of the Statute of Frauds, unless it belong to those particular cases, which the courts have held to be out of the operation of this statute;(1) and on the other must be such, regard being had to the situation and conduct of the parties, and all the circumstances of the case as to render it reasonable and proper that the contract should be enforced.(2)

(1) Of Agreements in Writing under the Statute.

I. With regard then to the form of the agreement it is enacted by the Statute of Frauds,(y) "That no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning *them, unless the agreement upon which such action shall be brought, or some [*54] memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto, by him lawfully authorized."

The statute therefore requires two conditions,—first, that the agreement shall be in writing; but notwithstanding this provision, the intention of which was to put an end to all parol(a) agreements, courts of equity not being within the express words of the statute,(b) have, in certain cases, considered themselves at liberty to give effect to verbal agreements for the sale of land. Second, that this agreement shall be signed "by the party to be charged therewith," upon which words it has long been the settled rule of a court of equity to decree specific performance of an agreement, which has been signed by the party sought to be charged with it; although it be not signed by the plaintiff in the suit, and he be not

(y) 29 Ch. 2, ch. 3, s. 4.

(a) Strictly speaking contracts are only of two kinds, specialties, and parol agreements,—the latter comprising as well agreements in writing not under seal, as verbal agreements. (*Rans v. Hughes*, 7 T. R. 350, n.) In the following pages, however, agreements will be spoken of as written or parol, the former comprising agreements in writing and signed conformably to the provisions of the statute, the latter such as are merely verbal.

(b) "This statute is in terms confined to actions at law not extending to suits in equity; and the word 'charge' evidently means charged in the action." Per Sir T. Plumer, M. R.; (*Martin v. Mitchell*, 2 Jac. & Walk. 427.)

[*55] equally bound by it.(d) It may be, *and indeed frequently has been matter of surprise, that it should be so settled, because, although such an agreement may satisfy the words of the Statute of Frauds, yet a court of equity does not generally lend its assistance to enforce agreements which are not mutual. Neither is a plaintiff seeking the aid of a court of equity to enforce an agreement, signed only by the party sought to be charged with it, put to prove that he accepted it; the filing of the bill *prima facie* sufficiently showing his acceptance; but the defendant is at liberty to repel the claim of the plaintiff by showing at the time he declined to accept it.

No peculiar form of writing, nor any particular mode of expression, having been prescribed by the statute as necessary, to constitute an agreement, it is of course immaterial what be its form, or what be the language used, provided the names of the parties, and the terms of the contract can be clearly collected from it: if therefore the agreement contains a plain and simple statement of these particulars, no question can arise upon it under the Statute of Frauds. The difficulty occurs when the agreement instead of being a plain and simple declaration of the terms of the bargain, has to be established on a correspondence, or on any other less formal and less distinct mode of stating the terms, which the parties may have thought proper to employ.

The most extensive and important class of cases arising out of the question, Whether there be an *agreement within the meaning of the statute? is that in which the terms of the agreement have to be collected from correspondence. Whether, as has been observed,(e) it might have been better originally, that courts of equity should not have entertained suits for specific performance of agreements, which are left to be made out from the terms of a correspondence between the parties, and whether courts of equity have not occasionally gone too far, in their anxiety to spell out the terms from obscure or imperfect correspondence, it cannot now be disputed, that it has been long since settled as the doctrine of the court, that such agreements, when it is possible to make them clearly out will be established.

The principles on which equity proceeds in cases of this kind, are very clearly stated by Lord Eldon in *Kennedy v. Lee*,(f) where he lays it down that in order to form a contract by letter, nothing more is necessary than this,—that, when one man makes an offer to another to sell for so much, and the other closes with the terms of his offer, there must be a fair understanding on the part of each, as to what is to be the purchase-money, and how it is to be paid, and also a reasonable description of the subject of the bargain. The party seeking the specific performance of such an agreement is bound however, to find in the correspondence not merely a

[*57] treaty,(g)—still less a proposal—for an agreement; *but a treaty with reference to which mutual consent can be clearly demonstrated, or a proposal met by that sort of acceptance, which makes it no longer the act of one party, but of both. He is bound therefore, to show to the court, upon the face of the correspondence, a clear description of the subject matter, relative to which the contract was in fact made and

(d) *Boys v. Ayerst*, 6 Mad. 323.

(e) *Kennedy v. Lee*, 3 Mer. 441.

(f) *Ibid.*

(g) *Stratford v. Bosworth*, 2 Ves. and Bea. 341.

entered into. It is not necessary that both parties really meant the same precise thing, but only that both actually gave their assent to that proposition, which, be it what it may, *de facto* arises out of the terms of the correspondence. And in *Huddleston v. Briscoe*,^(h) his lordship advertising to the effect of mere treaty, lays it down, that the court is not to decree performance unless it can collect upon the fair interpretation of the letters, that they import a concluded agreement; if it rests reasonably doubtful, whether what passed was only treaty, let the progress towards the confines of agreement be more or less, the court ought rather to leave the parties to law, than specifically to perform what is doubtful as a contract.

It follows, from what has been stated that where a proposal is made by letter, the answer, in order that the correspondence may constitute an agreement, must be a simple acceptance of the terms proposed, without the introduction of a new and different term. And therefore where one party made a proposal by letter for the purchase of a lease, [*58] and the other by his answer offered on the terms proposed to grant an underlease, it was held that this did not constitute an agreement, the grant of an underlease being a very different thing, and much less beneficial than an assignment of it.⁽ⁱ⁾

Where the proposal by letter is special, so also must the acceptance be; for if the letter, containing the proposal, does not in itself evidence all the terms of the engagement by which the person signing it consents to be bound, but require from the other party, not merely a simple assent to the terms stated, but a special acceptance which is to supply a further term of the agreement, than such special acceptance must be expressed in the letter accepting the proposal, or in some other writing clearly referred to by it; for otherwise the whole agreement would not be in writing within the Statute of Frauds.

Thus in a case where a purchaser in a letter containing all the other terms of the agreement proposed, as to the purchase-money, that he would be ready to pay it within a fortnight after the vendor should have removed a certain building on the premises; and that the vendor should himself name the time within which he would engage to remove the building, which time was to be inserted in a formal agreement, which the purchaser requested the vendor to have prepared. No agreement was ever prepared in pursuance of this request, and therefore the further term of the agreement mentioned in the *proposal (that is to say,) [*59] the time within which the vendor would engage to pull down the building, not being in writing, the entire agreement was not in writing, and the court therefore held that this was not an agreement within the Statute.^(k)

As correspondence may constitute an agreement within the meaning of this Statute, so also may any other writing which sufficiently evidences the terms of it. A receipt therefore for the purchase money, the auctioneer's receipt for the deposit, the auctioneer's memorandum, or note of such a person being the highest bidder in his sale-book—the price with the purchaser's name opposite on the back of the particulars, or any other writing duly signed, however alien its form and more obvious import may be to the nature of an agreement, will be sufficient. This is well

(h) 11 Ves. 591.

(i) *Holland v. Eyre*, 2 Sim. & Stu. 195.

(k) *Boys v. Ayerst*, 6 Madd. 323.

illustrated by Sir W. Grant, in *Blagden v. Bradbear*,^(f) where he thus expresses himself:—"The proposition that the auctioneer's receipt may be a note or memorandum of an agreement within the statute is not denied; but for that purpose the receipt must contain in itself, or by reference to something else, must show, what the agreement is. In this instance one very material particular, the price of the estate does not appear upon the receipt; for the amount of the deposit, unless we know the proportion it bears to the price does not show what the price is; and [*60] the *receipt contains no reference to the conditions of sale to entitle us to look at them for the terms."

It is not necessary that the letter or other written document containing the signature of the party to be charged should contain all the terms of the agreement: it is sufficient if they can be ascertained by any other writing, which is clearly referred to, although that writing is not signed; but there must be a clear reference to the particular paper, so as to prevent the possibility of one paper being substituted for another. If the terms of the agreement be contained in one paper, and the name of the party to be charged with it be found in another, clearly referring to, and identifying the former as containing the terms of an agreement concluded, the two papers will together constitute a written agreement within the meaning of the statute.^(m)

With respect to what shall be a proper signature, it must be observed, that the only object of the signature is the authentication of the agreement. If this be accomplished, it does not much signify in what part of the instrument the name is to be found;⁽ⁿ⁾ whether at the end, in the usual way of signing, or at the beginning, or in the body of the instrument. Where, however, the name appears in the beginning, or in the body of the agreement, it must plainly appear that it governs the whole instrument; for if the name be introduced incidentally *in [*61] the middle of the paper, and refer in grammatical construction only to a particular part, or a single term in the conditions, this will not be a signature within the statute.^(o)

As the only intent of the signature is the authentication of the instrument, it is no objection to the signature that it consists only of the surname of the party signing;^(p) or even of his initials only,^(q) provided the party so signing can be clearly ascertained.

The agreement need not be signed by the principal himself, the words of the statute being, that it must be signed by the party to be charged, "or some person lawfully authorized thereunto." And it is now clearly established, that such agent may be duly authorized by parol, and that writing is not necessary for this purpose.^(r) It has been long settled, and indeed it is obvious from the very nature of the relationship between the parties that the auctioneer must be the agent of the vendor, for the purpose of signing an agreement; but it was long a subject of considerable doubt, whether he could be considered as the agent of the purchaser, so as to bind him also by his signature. This point was finally set at rest in the affirm-

(f) 12 Ves. 471; and see *Coles v. Trecothick*, 9 Ves. 252.

(m) *Western v. Russell*, 3 Ves. & Bea. 187; *Clinan v. Cooke*, 1 Sch. & Lef. 22.

(n) *Ogilvie v. Foljambe*, 3 Mer. 62.

(o) *Stokes v. Moore*, 1 Cox 219.

(p) *Ogilvie v. Foljambe*, 3 Mer. 62.

(q) *Phillimore v. Barry*, 1 Camp. 513.

(r) *Coles v. Trecothick*, 9 Ves. 250; *Clinan v. Cooke*, 1 Sch. and Lef. 31.

ative by *Kemeys v. *Proctor*, (s) which underwent very great consideration,—a very strong case,—the purchaser not being [*62] present at the sale, and bidding by an agent, who after the sale refused to pay the deposit, or sign the agreement; notwithstanding which, Sir W. Grant decreed specific performance on the auctioneer's memorandum, or entry in the sale-book of the defendant's agent being the highest bidder.

(2) *Of Agreements not in writing, which equity will nevertheless specifically perform.*

Such being the general principles of the court in respect to written contracts, we come now to consider the cases where it has been thought proper to enforce the contract, although only in parol, and not in writing. The object of the statute, in enacting that all agreements should be in writing, and signed, or otherwise that they should not be binding, was to prevent the uncertainty, litigation, and fraud, to which merely verbal agreements are liable. And, therefore, equity held, that where it would have been a fraud on one party to hold him to the strict exigency of the statute, it was acting upon the spirit of the statute by relaxing the strictness of its letter. And accordingly, in certain cases, which occurred shortly after the statute came into operation, and in which manifestly there would have been great individual hardship in enforcing the *requisi- [*63] tions of the statute, equity, acting on its own principle of preventing fraud, and forgetting in the hardship of the case immediately before it the far greater hardship of the consequences which would necessarily result from a relaxation of the statute, suffered itself to be prevailed on, by reasons more ingenious than solid, to let in once more parol agreements. The consequence was, that for a long period it was unknown what parol agreements would or would not be enforced; how far the court would go in any particular case of hardship, or what were the principles of the court, even as to the cases where, as a general rule, parol agreements would be allowed;—the cases and *dicta* were so numerous, and so contradictory, that it was impossible to exhibit any clear and fixed rule; the beneficial objects of the statute were completely defeated and a flood of litigation was let in, at once vexatious, harrassing and oppressive.

Among the agitated questions of that day were such as these:—Whether sales by auction of lands were, or were not, within the operation of the statute? Whether an agreement not in writing, but confessed by the answer, should be enforced? Whether part performance should take an agreement out of the statute? What acts should be considered as constituting part performance? Whether possession was sufficient for this purpose,—and under what circumstances possession must be taken, so as to constitute it part performance? Whether payment of part of the purchase-money should constitute part *performance? [*64] and whether the payment of a large sum, or what was considered a substantial part of the purchase-money, was necessary to have this effect, or whether the payment of a small sum would do? Most of these questions have ceased to possess any interest, and it would be worse than useless to load these pages with the consideration of them, the jurisdiction of the court in enforcing agreements not in writing be-

(s) 3 Ves. and Bea. 57; S. C. affirmed on appeal, 1 Jac. and Walk. 350.

ing now reduced to a narrow compass, which is ascertained by distinct and well defined boundaries.

In the first place, then, it is now clearly settled, that sales by public auction are within the operation of the statute, and therefore if the terms of the purchase be not put down in writing, and signed either by the purchaser himself or his agent, it cannot be enforced against him; (z) and it has been recently decided that this doctrine is equally applicable to a sale of goods as of land.(u)

It seems also now to be settled, that part payment of the purchase-money is not such a part performance as will take an agreement out of the statute; this was so held by Lord Redesdale in *Clinan v. Cooke*(v) where his Lordship argues the question thus:—"But I think this is not a case in which part performance appears; the only circumstance that can be considered as amounting to part performance is the payment [*65] of the sum of fifty *guineas to Mr. Cooke. Now it has always been considered that the payment of money is not to be deemed part performance to take the case out of the statute. *Seagood v. Meale*(w) is the leading case on that subject; there a guinea was paid by way of earnest, and it was agreed clearly that, that was of no consequence in case of an agreement touching lands; now if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally, for it is paid in both cases as part payment, and no distinction can be drawn. But the great reason, as I think, why part payment does not take such agreement out of the statute is, that the statute has said,(x) that in another case, viz. with respect to goods, it shall operate as part performance. And the courts have therefore considered this as excluding agreements for lands, because it is to be inferred that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands."

Another ground, on which part performance is allowed to exclude the statute, is fraud; nothing therefore is to be considered as part performance which is not of that nature. Payment of money therefore is not part performance, for it may be repaid, and then both parties will be just where they were before, and no fraud on either.

[*66] The reasoning of Lord Redesdale goes to the *length of showing, that payment, even of the whole of the purchase-money, would not be such part performance as would take an agreement out of the statute; and whenever the case comes before the court it will probably be so decided. After this it can scarcely be necessary to add, that payment of the auction-duty cannot be considered to be part performance,—this being a mere fiscal regulation could, of course, never be permitted to vary or affect the mutual rights of the vendor and purchaser; nor that where an estate is sold in lots, part performance, as to one lot, would only take the agreement out of the statute as to that particular lot, and would not affect the others.(y)

The only cases where the court will enforce parol agreements are,—

(z) *Buckmaster v. Harrop*, 14 Ves. jun. 456.

(u) *Kenworthy v. Schofield*, 2 Barn. and Cress. 945.

(v) 1 Sch. & Lef. 40.

(w) *Prec. Chan.* 560.

(x) Sect. 13.

(y) *Buckmaster v. Harrop*, 7 Ves. 341; 13 Ves. 456.

First, where the sale is made under a decree of the court, in which case the sale being judicial and under the immediate sanction and cognizance of the court, there is no danger of fraud or perjury, which it was the great object of the statute to prevent, and consequently there not being the danger contemplated by the statute it is unnecessary to adhere to its provisions;(z) Second, where there has been such acts of part performance under a parol agreement as would render it unreasonable not to enforce the whole of it. In order to amount to part performance, the act must be unequivocally referrible to the agreement; and the ground on which courts of equity have allowed such acts to *exclude [*67] the application of the Statute of Frauds, is that a party who has permitted another to perform acts on the faith of an agreement shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed.(a)

On these grounds admission to possession having unequivocal reference to a contract, has always been considered an act of part performance. From the date of Lord Aylesford's case(b) it has been established, that delivery of possession, as an act of part performance, excludes the application of the Statute of Frauds: the reason of this is well argued by Lord Redesdale in *Clinan v. Cooke*:(c) "I take it," says his Lordship, "that nothing is considered as part performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed; for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement. This is put clearly in the case of *Foxcraft v. Lister*; there the party was let into possession on a parol agreement; and it was said he ought not to be liable as a wrong doer, and to account for the rents and profits; and why? because he entered in pursuance of an agreement; when, for the purpose of defending himself against a charge, which might otherwise be made against him, such evidence was admissible, and if *it was admissible for such purpose, there is no reason why it should not [*68] be admissible throughout."

The acknowledged possession of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an agreement, and as sufficient to authorize an inquiry into the terms of it, the court regarding what has been done as a consequence of contract or tenure. As between landlord and tenant, this reasoning does not apply, and, consequently, when the tenant is in possession at the date of the agreement, and continues in possession, it is obvious in many cases that such continuance amounts to nothing: the continuance in possession must be capable of being clearly referred to the contract, or it is not part performance; because as on the one hand, if possession be wrongfully *obtained*, that cannot be considered as an act of part performance;(d) so, on the other hand, possession wrongfully *retained* by the tenant, after notice to quit, would be as little entitled to be considered an act of part performance. In short, the principle to be deduced from the cases, and

(z) *Attorney-Gen. v. Day*, 1 Ves. sen. 218.

(a) *Morphett v. Jones*, 1 Swanst. 181.

(b) 2 Str. 783.

(c) 1 Sch. and Lef. 41.

(d) *Cole v. White*, 1 Bro., C. C. 409, cited.

the reason of the doctrine is very clear, and it is this,—that in order to constitute delivery of possession an act of part performance, that possession must be clearly referrible to the alledged parol agreement; for if that possession had been wrongfully obtained, it would of course be unavailable for this purpose; *if obtained for any other purpose different from that implied by the alledged agreement, it would be equally unavailing. On whom the *onus* of proof lies will depend on the circumstances—if a stranger be let into possession, and alledge a parol agreement, it will be for the owner, if he deny this, to show for what purpose possession was so given; on the other hand, if a person already in possession as tenant at the date of the agreement continue in possession, and he alledge this as an act of part performance of an agreement either for a new lease, or for a purchase, and the landlord deny this, then, as in legal presumption the tenant might be in possession, merely from having held over wrongfully, it will be for him to show that in point of fact he holds over, under an agreement either for a renewal or purchase; for this purpose he might show payment of additional rent, though this is an equivocal act, as it might have reference to a temporary arrangement;(e) or expenditure, in pursuance of such agreement, of such an amount, and for such purposes as could not be reasonably referred to any thing than the agreement he wishes to uphold;(f) or extensive repairs, alterations, and other acts of ownership.

Such are the general principles on which courts of equity enforce parol agreements, and such the cases in which, according to the present practice of the court, they will be enforced; but, Lord Redesdale in a case of frequent reference, has declared that he felt no disposition to carry the cases which have been determined on the Statute of Frauds any further than he was compelled by former decisions. That nothing could be more manifest to any person, who had been in the habit of practising in courts of equity, than that the relaxation of the statute had been a ground of much perjury and much fraud. If it had been rigorously observed, few instances of parol agreements would probably have occurred, as all agreements would, from the necessity of the case, have been reduced to writing; that the decisions on the subject had opened a new door to fraud, and that under the pretence of part execution, if possession is had in any way whatever, means were frequently found to put a court of equity in such a situation, that without departing from its rules it feels itself obliged to break through the statute; and that he remembered it was mentioned in one case in argument, as a common expression at the bar, that it had become a practice “to improve gentlemen out of their estates.” That it had therefore become absolutely necessary for courts of equity to make a stand, and not carry the decisions further; and accordingly in the case then before him which he declared to be a strong case for adherence to that principle, he refused specific performance of a parol agreement for three lives proved by one witness, the answer admitting an agreement for one

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*life only, supported by the testimony of one witness, and not inconsistent with the evidence of part performance given by the plaintiff.(g)

(e) *Wills v. Stradling*, 3 Ves. 378.

(f) See *Savage v. Carrol*, 1 Ball and Best. 265.

(g) *Lindsay v. Lynch*, 2 Sch. & Lef. 5.

SECTION IV.

Of the Bill, Answer, &c.

In a bill for specific performance it is not necessary to alledge that the agreement is signed by the party to be charged; it is sufficient to state that the agreement was in writing; (*h*) the reason assigned by Sir J. Leach, that "if the paper were not signed it was not an agreement, and that therefore signature must be presumed till the contrary be shown" does not appear to be very satisfactory; though it is not difficult to show, on technical principles, that the decision is nevertheless a sound one. For this purpose it may be observed, that at law it is sufficient now, as it was before the statute, to alledge an agreement generally, without saying either that it was in writing or signed; and then, if the defendant means to avail himself of the statute, he must show that the agreement is not in writing, or not signed according to the exigency of his case.

On the same principle it would seem to be sufficient to alledge in equity, where the pleading is generally less strict, an agreement simply, without saying that *it was signed, or even in writing, and leave the [*72] defendant to avail himself of the statute by answer, plea, or demurrer, as he might be advised. According to the settled practice, however, it is necessary to alledge that the agreement is in writing, which Lord Thurlow (*i*) considers is thrown into the bill for the mere purpose of forcing the defendant to plead the statute instead of demurring, and then the plea must be supported by an answer denying the agreement, for if he *confessed* the agreement the court would decree specific performance, notwithstanding the statute. (*k*) The opinions of the equity judges are, at an early period, very various as to the effect of an admission of an agreement. In a case which has been just cited Lord Macclesfield held, that even a plea of the statute would not protect the defendant if he confessed the agreement. Lord Bathurst, on the other hand, thought that, notwithstanding such confession, still the court would not enforce the agreement, except there were fraud. "The only case," said his Lordship, "I know, that takes a contract out of the statute, is fraud, and the jurisdiction of the court is principally intended to prevent fraud and deceit. When a party has given ground to another to think he had a title secured, the court will secure it to him; the ground, therefore, in making and refusing decrees has been *fraud. (*l*) Neither of [*73] these views was ultimately adopted, Lord Thurlow (*m*) having first rather obscurely, and Mr. Baron Eyre afterwards distinctly laid it down, (*n*) that all the cases in the books, which had been determined on the defendant's admission, were cases where the statute was not insisted upon. Lord Eldon follows up the same view of the case of Cooth

(*h*) *Rist v. Hobson*, 1 Sim. & Stu. 543.

(*i*) *Whitchurch v. Bevis*, 2 Bro. C. C. 559.

(*k*) *Child v. Godolphin*, 1 Dick. 30, S. C. cited 2 Bro. C. C. 566; *Cottingham v. Fletcher*, 2 Atk. 155.

(*l*) *Eyre v. Popham*, Lofft, 806.

(*m*) *Whitchurch v. Bevis*, 2 Bro. C. C. 559; *Whitebread v. Brockhurst*, 1 Bro. C. C. 412.

(*n*) *Stewart v. Careless*, cited, 2 Bro. C. C. 563, 565.

v. Jackson,^(o) where he intimates his opinion to be, "that if the defendant admits the agreement, but insists upon the benefit of the statute, the statute protects him: if he does not say any thing about the statute, then he must be taken to renounce the benefit of it."^(p)

And Sir W. Grant ultimately held that,—“according to the modern, which he thought to be the correct, doctrine, it is immaterial what admissions are made by a defendant, insisting upon the benefit of the statute; for he throws it upon the plaintiff to show a complete written agreement; and it can no more be thrown upon the defendant to supply defects in the agreement, than to supply the want of an agreement.”^(q)

Where, however, a party admits an agreement, not insisting upon the Statute of Frauds, this it seems will be considered a waiver [*74] of the benefit of the statute, and he will be decreed to perform the agreement.^(r)

Where the plaintiff in his bill states an agreement, and the defendant by his answer admits that agreement in a modified form, the court will, it seems, if satisfied that the defendant's is the true statement of the agreement, decree specific performance of it in that form, at the instance of the defendant, without putting him to the expense of filing a cross-bill; but, if the court is not satisfied that the defendant's construction of the agreement is the true one, it cannot decree specific performance of it, without the consent of the plaintiff, and the bill must be dismissed.^(s)

Where the plaintiff by his bill states one agreement, and the defendant by his answer admits a different agreement, the plaintiff if he amend his bill, stating the agreement as admitted by the defendant, and praying specific performance accordingly, will be entitled to a decree. But, where he insists on the agreement, as he himself states it, and the court is ultimately against him, he cannot at the hearing, under the prayer for general relief, have a decree according to the defendant's construction; nor if he have previously amended his bill praying in the alternative, [*75] that if the court should be against his construction, that *he may have a decree according to the defendant's. All that the court can do is, to dismiss the bill without prejudice to his bringing in a new one.^(t)

It does not follow that because a court of equity will not enforce a contract, that it will therefore order it to be delivered up, on a bill for that purpose, and thereby deprive the other party of any remedy he may have at law. Fraud varies in degree, ranging between the grossest imposition and dishonesty on the one hand, and circumstances of mere negligence or mistake on the other; the former may afford very sufficient ground for not only refusing to decree specific performance, but also for having the contract delivered up; the latter, though insufficient to induce the court to order the agreement to be delivered up to be cancelled, may yet be strong enough to induce it to refuse interfering actively in carrying it into effect. And accordingly the distinction is now clearly

(o) 6 Ves. 39.

(p) And see *Rowe v. Teed*, 15 Ves. 375.

(q) *Blagden v. Bradbear*, 12 Ves. 471.

(r) *Spurrier v. Fitzgerald*, 6 Ves. 548, in this case indeed the defendant expressly submitted to perform the agreement, but it does not appear that this execution affects the principle of the decision.

(s) *Higginson v. Clowes*, 15 Ves. 525, 2nd ed.

(t) *Lindsay v. Lynch*, 2 Sch. & Lef. 12. *Legal v. Miller*, 2 Ves. sen. 299.

settled, that there are many cases in which the party has obtained a right to sue upon the contract at law, and in such circumstances that his conscience cannot be affected in equity, so as to deprive him of that remedy; and yet, on the other hand, the court declaring he ought to be at liberty to proceed at law, will not actually interpose to aid him, by specifically performing the contract.(u)

Where an agreement is in parol only, it is manifest *that [*76] parol evidence must be admitted to show what were its terms; but where the agreement is in writing, and signed by the parties, they are bound by what appears on the face of it, and cannot be allowed to introduce parol evidence to add to, or vary its terms: for the admission of parol evidence in such a case, would entirely break in upon the statute, and introduce all the mischief, inconvenience, and uncertainty, which it was designed to prevent.(v) This which is a reason applying peculiarly to agreements, which are the subject of a suit for specific performance between vendor and purchaser, flows directly out of the words of the statute, which says that no one shall be charged by such agreement unless it be in writing, and signed; but there is another reason of a more general description, which arises from the law of evidence, it being a general principle, applicable as well to courts of equity as of law, that parol evidence of the intention of the parties is not admissible to explain, vary, or add to, the terms of a written contract.

The exclusion of parol evidence offered to explain, add to, or in some way vary, a written contract relative to land, stands therefore upon two distinct grounds: such evidence is rejected, not simply as being in direct opposition to the Statute of Frauds, but also upon the general rule of evidence, independent *of the statute that a written instrument must speak for itself, and can receive no aid from extrinsic evidence of this more loose and dissatisfactory nature. [*77]

In considering the admissibility of parol evidence to explain, or modify a written agreement, the subject has been involved in much obscurity, and given rise to great difficulties both in the minds of judges and text writers, by not keeping sufficiently distinct the various classes of cases in which this question has arisen. By making a clear distinction between those cases, which come directly within the words of the statute, and those which have depended entirely on the general principles, according to which courts of equity are in the habit of acting in matters of fraud, mistake, or surprise, a great deal of this difficulty will vanish. A party seeking performance of an agreement written and signed, claims the interference of the court, on the ground that his case comes within the statute, and (with the exceptions which have been noticed) it is on this ground alone, that the court assists him. Such a person therefore is not allowed to modify his agreement by parol evidence, because this would be to grant the assistance of the the court not in furtherance of the statute, but in opposition to it. The rule therefore is clearly settled, that a plaintiff in a suit for specific performance, can in no case be admitted to prove that any of the terms of the agreement have been omitted, or varied by fraud, *mistake, or surprise, and [*78] that it is different from what the parties intended.

(u) *Mortlock v. Buller*, 10 Ves. 308; *Savage v. Taylor*, Ca. tem. Talbot, 234.

(v) *Per Buller, J.*, in *Brodie v. St. Paul*, 1 Ves. jun. 326; and *Clinan v. Cooke*, 1 Sch. & Lef. 36, where all the cases are collected and examined by Lord Redesdale.

A great deal of confusion is to be found in the books as to the question, whether in any case parol evidence could be let in on the part of the *plaintiff* in such a suit, on the ground of fraud, mistake, or surprise: the true principle clearly is that it cannot,—first, because the statute has said the agreement is to be in writing,—and second, because if there have actually been fraud, mistake, or surprise, and the written agreement is really different from what one or both of the parties intended, the proper course is to file a bill in the first instance for the rectification of the agreement; for in such a suit parol evidence would be clearly admissible, on the ground of fraud, or surprise, *(w)* and then if the plaintiff succeeds in getting his agreement rectified, he could file his bill for specific performance of the agreement so rectified.

On the other hand, it is established with equal clearness, that for the purpose of resisting a suit for specific performance, parol evidence is admissible,—and this, because the statute does not require the grounds of resistance to be in writing, and has left the defendant in such a suit in precisely the same situation as he was before its enactment. The statute does not say that a written agreement *shall* bind, but that an unwritten [*79] agreement shall *not* bind; *leaving it therefore to the defendant to make the same defence now, as he might have done before the statute; and, consequently, as before the statute he might have resisted the agreement on parol evidence, that the agreement was not what he meant to have entered into, so he may now say the agreement was not what he meant to have signed.

Fraud is not the only head upon which parol evidence may be received; and if made out satisfactorily, a specific performance may be refused. Upon clear evidence of mistake or surprise, and that the parties did not understand each other, it is introduced not to explain or alter the agreement, but for the purpose of showing circumstances of which would render a specific performance, as in the case of fraud, unjust and therefore not conformable to the principles upon which a court of equity exercises this jurisdiction. There is, however, considerable difficulty in the application of evidence under this head; lest under this idea of introducing evidence of mistake, the rule should be relaxed, by letting it in to explain, alter, contradict, and in effect get rid of a written agreement. *(x)*

In short, in order to reconcile all the authorities, it is only necessary to separate the jurisdiction of the court under the statute from its general equitable jurisdiction. If the party seek relief under the statute he must abide by his written agreement; if he come in under the general jurisdiction of the *court on a case of fraud, mistake or surprise, [*80] every species of evidence is admissible.

Where the terms then of an agreement are ascertained in writing, nothing can be added to them: if in the agreement there be any obscurity or contradiction, parol evidence is not admissible to explain such obscurity or contradiction; and the court will refuse to enforce it. If there be any term of the contract omitted, parol evidence cannot be admitted to supply the defect, and on this ground also the court will refuse to interfere. *(z)*

(w) Marquis of Townshend v. Stangroom, 6 Ves. 338; Beaumont v. Bramley, Turn. 56.

(x) Clowes v. Higginson, 1 Ves. & Bea. 527.

(z) See Boid v. M'Curdie, 1 Smith & Batty, 425, where parol evidence was let in to explain the parcels.

Whatever obscurities or imperfections appear on the face of the contract, must be removed by construction, and cannot be explained by external evidence. If, however, there should be any obscurity or ambiguity, not patent on the face of the agreement, but latent,—that is to say, which is only discoverable by means of parol evidence, in that case and in that case only, parol evidence is admissible to explain it; and, though the subject and import be clear, so that there is no necessity to resort to evidence for its construction, yet if the defendant can show any circumstances, *dehors*, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a court of equity, having satisfactory information upon that subject, will not interpose. The rule admitting evidence in those cases, is intelligible and clear. It is admitted, not to vary an agreement as it is expressed, open to no objection and therefore upon the letter binding, but to show circumstances of fraud; making it unconscientious in the party, *who so obtained it, to insist upon, and unjust in the court to decree, the perform- [*81]
ance.(y)

As specific performance may be resisted by parol evidence of fraud, mistake or surprise, so also may it be resisted by *parol* evidence, that the parties had abandoned the agreement. This question has been much embarrassed by some *dicta* of Lord Hardwicke: thus in *Backhouse v. Crosby*,(z) though he would not say that a contract in writing could not be waived by parol, he declared that he should expect in such case very clear proof, and observed that the statute stated that all agreements concerning land should be in writing; and an agreement to waive a contract for purchase is as much an agreement concerning lands as the original contract: and in *Bell v. Howard*(a) he said that an interest in land could not be parted with or waived by naked parol without writing, although such parol waiver might be used to rebut the equity to have the articles specifically performed.

This last passage, indeed, contains the true distinction, and completely answers the objection, that an agreement to waive a contract is as much an agreement concerning land as the original contract, *parol* evidence of abandonment being let in merely to rebut an equity, and being admitted on the same ground as in the other cases of fraud and mistake which have been already considered.(b)

*That a written agreement may be waived by parol is a point therefore not only clearly recognized by the authorities, [*82] but stands also upon sound reason: in order, however, that parol waiver and abandonment may be set up as a defence to a bill for a specific

(y) *Clowes v. Higginson*, 1 Ves. & Bea. 527.

(z) 2 Eq. Ca. ab. 32, pl. 44.

(a) 9 Mod. 302.

(b) According to a report of *Backhouse v. Crosby*, contained in a note to *Gordon v. Gordon* (3 Swanst. 434,) Lord Hardwicke is made to speak more clearly than in the *dicta* mentioned in the text. According to this report, his lordship lays it down:—"The defence insisted on is of a tender nature, and to be received by a court of equity with great caution; for even the agreement to depart from a former agreement is as much an agreement concerning lands and tenements as the first; and, therefore, taking it originally and abstracted from the circumstances, ought as much to be in writing, and is equally within the Statute of Frauds: but notwithstanding that, if it clearly appear that a plaintiff in a court of equity, insisting on such an agreement, contained in letters, has by acts done, waived, and thereby drawn in another to purchase, and complete his purchase, in such case it would be a good defence to be insisted on by a second purchaser, showing that he proceeded *bona fide*, and, consequently, would rebut any equity of the first purchaser."

performance, it must be established with the greatest clearness and precision; and the circumstances of waiver and abandonment must amount to a total dissolution of the contract, placing the parties in the same situation in which they stood before the agreement was entered into.(c)

Though variations, *verbally agreed* on, are not sufficient to prevent the performance of a written contract, yet variations *acted* upon may be a bar to a specific performance of the original agreement; these acts having been such that the original agreement could no longer be enforced without [*83] out *injury to one party,—being, in short, such acts of part performance as would induce the court to enforce a verbal agreement on this ground alone. Thus in the case of *Legal v. Miller*(d) the original agreement contained a provision that the landlord should repair the house; on examination, it was found not worth repairing, and that it would be better to rebuild it. The house was pulled down by consent of the tenant, who was apprised of the additional expense this would create, and agreed by parol to give an increased rent; afterwards he filed his bill for performance of the original agreement, which was dismissed on the ground that the execution of it under the new circumstances, would be a fraud upon the landlord; he having rebuilt instead of repairing the house, and the tenant having agreed to pay an additional rent, in consideration of the additional expense.

SECTION V.

Of the Equitable Circumstances which will induce the Court to refuse Specific Performance.

Assuming the contract to be in writing, and signed by the party to be charged with its performance pursuant to the provisions of the Statute of Frauds, a court of equity will not specifically perform [*84] the contract, unless it be equitable so to do. "The agreement," to adopt the language of Lord Hardwicke, "must be certain, fair and just in all its parts; if any of these ingredients be wanting, a court of equity will not decree specific performance of it."(e) Hence if the contract be tainted with fraud,(1) or mistake or surprise, materially affecting its whole substance and character,(2) or uncertainty,(3) or great hardship,(4) or want of mutuality,(5) or if there have been unreasonable delay in the party seeking the assistance of the court,(6) or if the parties be legally incompetent to fulfil the contract,(7) or there be no consideration, or an inadequate consideration,(8) &c. &c.; in all these cases, and on these grounds alone, without reference to any question which may be raised on the title, the court will refuse to interpose its assistance to carry the agreement into effect,—the court requiring to be satisfied, not only that the contract is drawn up conformably with the requisitions of the Statute of Frauds, or comes clearly under the principles of certain classes of cases which have been held to be out of its operation; but also that, regard being had to the situation of the parties, and the circumstances under which the contract was entered into, it is reasonable and just to decree specific performance.

(c) *Robinson v. Page*, 3 Russ. 119. *Price v. Dyer*, 17 Ves. 364.

(d) 2 Ves. Sen. 299.

(e) *Buxton v. Lister*, 3 Atk. 383; and see *Martin v. Mitchell*, 2 Jac. & Walk. 423.

*(1) *Of Fraud.*

[*85]

Fraud may be either actual or constructive; that is to say, may be effected by actual misrepresentation on the one hand, or by diligent concealment on the other; a party who industriously conceals a known defect being, in the estimation of a court of equity, as guilty of fraud, as he who deceives by actual misrepresentation.

Modern authorities, with the exception of one case, ^(f) which will be presently examined, concur in establishing the proposition, that a party guilty of misrepresentation, even *to a small extent*, cannot come into a court of equity for the specific performance of an agreement; to entitle himself to this relief, he must come there with clean hands, and be liable to an imputation in the transaction: ^(g) "There is no case," says Sir W. Grant, "where, when misrepresentation was the ground of the contract, a specific performance has been decreed. The conduct of the person seeking it must be free *from all blame*. Misrepresentation forms a *personal bar* to the party." ^(h)

Mere misrepresentation, grounded upon the ignorance of the party making the representation in question, and with reference to a subject as to which both parties had equal access and equal means of forming a correct judgment, is not such a misrepresentation *as will necessarily induce the court to refuse specific performance,—be- [*86] cause such circumstances do not of necessity imply *mala fides* in the party making the misrepresentation. In such a case the true question would be whether fraud, or that degree of culpable negligence which the court would consider as amounting to fraud; was an ingredient in the misrepresentation,—and, on the other hand, whether the other party was prejudiced by this misrepresentation, because if both these questions should be answered in the negative, it would not be reasonable that a simple misrepresentation, not proceeding from *mala fides* on the one side, nor working any wrong or injustice on the other, should induce the court to refuse specific performance.

Thus in *Scott v. Hanson*, ⁽ⁱ⁾ where a piece of land was described as "uncommonly rich water-meadow land," it turned out on examination that in point of fact, the land was imperfectly watered, and the purchaser refused to complete on the ground that this was a misrepresentation: the Lord Chancellor ^(k) expressed his concurrence in the opinion of the court below, that the epithet "uncommonly rich," was applicable to the quality of the *land*, and not of the *irrigation*: and observing that the land was sold by assignees, that it did not appear they were apprised of the nature of the property, and that there was no evidence to show any fraud, or intentional misrepresentation on the part *of the vendors, [*87] affirmed the Vice-Chancellor's decree for specific performance. This case then falls clearly within the principles above stated,—first the absence of *mala fides*,—second a misrepresentation as far as it could

^(f) *Fellowes v. Lord Gwydyr*, 1 Sim. 63.

^(g) *Cadman v. Horner*, 18 Ves. 10.

^(h) *Clermont v. Tasburgh*, 1 Jac. & Walk. 112. *Ord v. Noel*, 5 Madd. 438; *Meadows v. Tanner*, 5 Madd. 34.

⁽ⁱ⁾ 1 Sim. 13; affirmed on appeal, 1 Russ. & Milne, 128.

^(k) 1 Russ. & M. 131.

be so considered, arising from the information of others, and relating to a matter which was equally open to the purchaser and the vendor.

In *Harris v. Kemble*(*l*) specific performance was also decreed notwithstanding alleged misrepresentation; there also the misrepresentation (if so to be called,) was not made on the personal knowledge of the plaintiff, nor with respect to matters of which the defendants could not instruct themselves, but with reference to accounts to which all the parties had equal access, which were at all times open to their inspection, which were actually inspected by the defendants, and with which they were so well acquainted, that an alteration in the mode of keeping them, suggested by one of the defendants, was actually adopted. Sir J. Leach seems to have gone upon the ground that the misrepresentation was not made fraudulently or with a design to deceive, and that therefore the misrepresentation wanted that ingredient, which constitutes it a 'personal bar.' This judgment was nevertheless reversed by Lord Lyndhurst, C., and his reversal has been affirmed in the House of Lords.(*m*)

In the nearly cotemporaneous case of *Fellowes v. Lord Gwydyr*,(*n*) [*88] the decision appears to have *proceeded on grounds which cannot be reconciled with the principles which have been here stated. In this case Lord Gwydyr being entitled as Deputy Lord Chamberlain to the fittings-up and decorations of Westminster Hall, at the coronation of the late king, sold then to the plaintiff, who was his deputy, or assistant in that office, for £1000. The plaintiff afterwards *in the name and as the agent* of Lord Gwydyr, signed an agreement with Page for the sale of these decorations to him for fifteen hundred guineas.

Lord Gwydyr's name had been used without his consent, or approbation, and he refused either to bring an action himself, or permit his name to be used in bringing an action against Page, for breach of the agreement. The plaintiff filed his bill for specific performance, and the defendant Page, in his answer alleged that he was led to believe by the plaintiff's representations, that Lord Gwydyr was the owner of the articles, —that he signed the agreement on the faith that he was dealing with Lord Gwydyr, and that he believed from what he had heard of his lordship, and known of his father, that if the articles were not worth fifteen hundred guineas his lordship would not permit him to bear the loss; that he would not have signed the agreement, if he had known that Lord Gwydyr was not entitled to the articles, and that he had sold them at a considerable loss. Specific performance was decreed on the ground that the plaintiff's "concealment of the speculative bargain he had made with Lord Gwydyr, could work no injustice to the defendant Page," Sir J.

[*89] Leach said "that if the plaintiff, *by the use of Lord Gwydyr's name, really desired to conceal the speculative bargain with Lord Gwydyr, it would afford no principle upon which the defendant could escape from the contract without special circumstances, and none are proved here." Lord Lyndhurst, on appeal, admitting that he thought it sufficiently made out, that the effect of the plaintiff's contract had been to mislead Mr. Page, and consequently admitting the fact of *intentional*, and therefore *fraudulent*, misrepresentation, yet proceeding ex-

(*l*) 1 Sim. 111.

(*m*) *Dem. Proc.*, 13 Oct. 1831.

(*n*) 1 Sim. 63, affirmed on appeal, 1 Russ. & Milne, 83.

actly on the ground, which had been relied on by Sir J. Leach in the court below, said "the only question here is, what loss or inconvenience has Mr. Page sustained in consequence of acting under that mistake? There is nothing in the cause, which can lead me to suppose, that he would not have contracted with the plaintiff, or that he would have declined to offer the sum of 1500 guineas had he been aware of the party who was really the owner of the property. Mr. Fellowes says, that the name of Lord Gwydyr was not used for any improper purpose, but even if it were otherwise, that circumstance alone would furnish no reason why Mr. Page should be released from his contract without showing in some way that the deception had operated to his prejudice."

Either the doctrine as laid down in this last passage by Lord Lyndhurst,—or the doctrine laid down in the former part of this section, on the authority of Sir W. Grant, is erroneous, for the one is directly in opposition to the other: It ought, however to be *observed [*90] that the law, as stated by Sir W. Grant, is not only based [*90] on the immutable principle of a court of equity, that he who seeks its assistance to enforce his own just claims, shall himself come into court free from any taint or imputation in the matter,—but is also in harmony with the entire current of authority. Lord Lyndhurst admitted that, in effect, the misrepresentation did actually deceive; on what possible ground could it be contended that the plaintiff did not intend to deceive,—the whole tenor of the transaction shows that this was his intention: he was guilty, therefore, of misrepresentation *mala fide*, and this circumstance alone, precluded him from coming into a court of equity for relief; it was not necessary for the defendant to prove "special circumstances," nor to show that, "he had sustained any prejudice;" for the plaintiff had violated the condition on which alone this court interposes its extraordinary jurisdiction, and, therefore, was not in a situation to claim its benefit.

Where the contract is founded on a gross breach of trust by an agent to his principal, it seems to be quite clear, on the ground of fraud, that the court will not assist a party seeking to avail himself of such a breach of trust. Where, however, such a breach of trust, as between agent and principal, savours rather of negligence than actual fraud, and consists in mismanagement and a want of due care and attention, then it seems not to be clear whether the court would refuse to assist a party wishing to avail himself of a contract from the agent *under such circumstances. This point was much considered in *Mortlock* [*91] v. Buller: there Lord Eldon, adverting to a class of cases where the property has, through the negligence and mismanagement of an agent, been sold at a great under-value, says, "the negligence may be more or less gross. Upon the principles that have been ably pressed for the plaintiff, if a person is to have a specific performance under such negligence as this, where is it to stop? Upon that ground simply, I should hesitate long before I should state, as a clear proposition, that where the title to a specific performance is founded in a gross breach of trust by an agent to his principal, a court of equity would assist the plaintiff, in the purpose of availing himself of that breach of trust, and whether the principle would not authorise the court to leave him to law, and not to let him come here for a remedy beyond that. There are *dicta* enough well to authorise that." (o)

It will be presently seen that mistake alone is sufficient ground for resisting specific performance,—*à fortiori*, therefore, will it be so, where it is connected with a breach of trust; as where the contract is entered into by trustees for sale, and the property is sold at a price much below its value, the court will not interfere against the *cestui que trust*, but it seems will leave the purchaser to seek such remedy as he may have at law against the trustees for damages. (p)

[*92] *Where a person enters into a contract with a third party, in ignorance of this party being a trustee for a second person, with whom he had refused to treat, it seems now that specific performance will not be enforced at the suit of this person, who has so managed to make a bargain collusively, which he could not obtain directly. The celebrated case of *Philips v. the Duke of Buckingham* (q)

(p) *Bridger v. Rice*, 1 Jac. and Walk. 74.

(q) 2 Vern. 227, Raithby's ed. The circumstances of this case are singular. Philips having been in negotiation with the Duke of Buckingham, for the purchase of an estate, the negotiation was broken off on account of a difference as to the price. Afterwards in order to compass the purchase Philips procured Mr. Niccoll, the Lord Chancellor Nottingham's Secretary, to negotiate the matter for him; and it being pretended to the Duke that this purchase was for the Lord Chancellor or his son Mr. Solicitor Finch, the Duke declared himself willing to oblige any of that family, and said, if the Lord Chancellor would please any way to satisfy himself of the value of the estate, he should set his own price. Niccoll afterwards agreed with a land-jobber, whom the Duke had employed in this affair, to buy the estate for £28,000. The Duke and Niccoll thereupon entered into articles, whereby the Duke did mention to grant, bargain and sell this estate to Niccoll and his heirs in the present tense. The Duke afterwards discovering that this purchase was in trust for Mr. Philips, looks on himself as ill-used in this matter, and refuses to perform the articles, or execute conveyances. Ultimately a bill for specific performance was filed against the Duke, his trustees, and certain persons mortgagees of the estate. The trustees and mortgagees answer; the Duke stands out to sequestration, and then the plaintiffs go on against the trustees and mortgagees, obtain a decree against them to convey and assign, which the mortgagees afterwards on payment of the money did accordingly.

The Duke afterwards came in and answered, and on the cause coming on to be heard against him, the Lord Keeper (North) declared his opinion that there had not been fair and open dealing in this affair, but that the Duke appeared to him to have been misinformed, and drawn in; and that the Duke having a great value for the Lord Chancellor or Mr. Solicitor, declared himself willing to part with the estate to either of them, for less than he would have done to another. And that being the intention of the agreement, Lord Keeper said, he would not in equity carry it into execution for the benefit of a stranger, and said, "articles, out of which an equity could be raised for a decree *in specie*, ought to be obtained with all imaginable fairness, and without any mixture tending to surprise or circumvention," and therefore declared he could not in justice decree the articles to be performed *in specie*. He also said that Mr. Philips had here a person of great honour to deal with, and ought to have carried the matter fair and open with him; but declared if the bill had been brought in Mr. Solicitor's name, and he would have patronised the purchase, the articles must have been decreed, and no one could doubt but he might have sold to Mr. Philips the next day, but it was another case that was now before him.

Notwithstanding this report, from which it would appear that specific performance had been refused, the decree was in fact the other way. Mr. Raithby, in his note states, that at the hearing, the court respited the judgment, and recommended a compromise; this not being effected, the cause came on for judgment, as to the Duke of Buckingham, shortly after, when it was stated on the part of the plaintiff Philips that the parties had obtained a decree against the other defendants, the mortgagees and trustees, and that pursuant to such decree, Philips had paid £16,000 to the mortgagee, according to a report of the Master, who had been ordered to state and settle the said mortgaged debts, and had also at the same time paid £5,000 to the trustees, and that Philips was now in possession of the estate, and that the Master's report had directed how the residue of the purchase-money ought to be paid and applied. It was decreed that the Duke of Bucks should make and perfect a good assurance to the plaintiff Philips, and should procure his wife the Duchess of Bucks to join and levy a fine, and that upon such assurance being made, the plaintiff should pay the residue of such purchase-money, subject to the deduction of what should be found due to the plaintiff for his costs of the suit. (Reg. Lib. 1683, B. fol. 358.)

was for a long period regarded as the leading authority on this subject, *and several cases were decided on the faith of that decision. [*93] Although, however, that case, as it *turns out on examination of the Registrar's Book, is no authority for that doctrine, it is, nevertheless, now the settled law of the court. In [*94] *Popham v. Eyre*,^(r) *Popham* had absolutely refused to deal with *Eyre*, who had been guilty of a former breach of contract, unless the money was paid down on a certain day, which he was unable to do, but procured another person to purchase it on his account. Lord Bathurst, on appeal, reversed Sir Thomas Sewell's decree for a specific performance. On this principle, in a recent case, a lease of certain premises, where a partnership trade had been carried on, having been renewed by one partner clandestinely in his own name, this renewal was declared to be a trust for the partnership, and to be accounted for accordingly.^(s) So in *O'Herlihy v. Hedges*,^(t) where an insolvent tenant made over his lease to another person, who treated with the landlord for a renewal to himself, ostensibly, but under a secret engagement in trust for the original tenant, Lord Redesdale *held, and very justly,^(u) that [*95] he would not execute that agreement as against the landlord, forcing upon him a tenant whom he never would have chosen, and unable to execute the agreement, into which the ostensible tenant had entered; and, therefore, the principle that a trustee should derive no benefit to himself should fail, rather than be carried into effect against a third person, not apprised of the secret engagement, and imposed upon by the default of him who claimed as the *cestui que trust*. Lord Redesdale, however, laid it down in that case, "that if the farm had been occupied by the trustee, the court must have held him to be accountable for the profits; that as between them there was no reason for not carrying the trust into execution, the interest of the landlord was the only impediment." And this principle may be considered to be recognized in a late case, where the court decided, that an agent employed to purchase an estate, having become the purchaser himself he was to be considered a trustee for his principal, and decreed him to re-convey accordingly.^(v)

The suppression of a truth, as well as the advancement of a falsehood, equally constitutes fraud; and, therefore, an industrious concealment of a defect, either as to the title of an estate, its quantity, quality, or condition, affords sufficient ground for resisting specific performance. This is well illustrated *in the case of *Shirley v. Stratton*.^(w) [*96] That was a suit for the specific performance of an agreement, for the purchase of an estate in marsh-land at Barking, in Essex. The defence was, that the estate was represented to the defendant as clearing a neat value of £90 *per annum*, and no notice was taken to him of the necessary repair of a wall, to protect the estate from the river Thames, which would be an outgoing of £50 *per annum*. And it appearing upon evidence, that there had been an industrious concealment of the circumstance of the wall during the treaty, the Lord Chancellor dismissed the bill but without costs.

(r) Lofft, 786.

(s) *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

(t) 1 Sch. and Lef. 123.

(u) Per Sir W. Grant in *Featherstonhaugh v. Fenwick*, *id sup.*

(v) *Lees v. Nuttall*, 1 Russ. and M. 53.

(w) 1 Bro. C. C. 440.

The same estate afterwards became the subject of another suit, which was very hardly contested by the name of *Shirley v. Davis*; the same plaintiff having sold the estate again, to another gentleman of the name of Davis, under a like concealment of the expenses of the wall. That gentleman's known object was to be a freeholder of Essex, and the plaintiff represented the estate to be in that county. Sometime after the purchase, Mr. Davis ascertained that it was in the county of Kent, by his having been chosen churchwarden of Greenwich. The result of this suit is not known, it being stated by Lord Eldon(x) that the contract was confirmed, and by Lord Redesdale that the court refused to confirm it.

[*97] Both these learned men were, it seems, counsel for the *defendant, but there seems great reason, under all the circumstances of the case, for thinking that Lord Redesdale's statement is correct.(y)

In *Bonnett v. Sadler*,(z) an agreement for a lease was obtained from the plaintiffs, who were coach-makers, of a house adjoining their premises, under a pretext that they, the defendants, were shoe-makers; but afterwards upon the representation that this was a mistake, and that they were not engaged in any trade, and wanted the house as a private house. The defendants undertook to lay out £100 in repairs, under the direction of the plaintiffs. As soon as they had obtained possession under the agreement, they immediately began to make the necessary alterations in the house, for carrying on the business of a coach-maker. The plaintiffs applied for and obtained an injunction *ex parte*; and on the coming in of the answer, the defendants moved to dissolve the injunction, first, on the ground of misrepresentation, surprise, and deceit; and second, on the dangerous state of the house, in consequence of the alterations, which were necessarily very extensive. This motion was refused, and the injunction continued to the hearing, mainly on the ground, as it would seem, of the agreement having been obtained "under surprise, produced by a studious, artful, and what a court of equity [*98] calls, fraudulent *concealment, for the very purpose of obtaining a lease, which the plaintiffs knew would not have been granted, except under the effect of that concealment."

In reference to the case of *Philips v. The Duke of Buckingham*, which had been cited in support of the injunction, Lord Eldon said—"With respect to such a transaction as was the subject of that cause, though certainly Lord Thurlow intimated a doubt,(a) whether a man treating with a third person, in trust for a second, whom he had refused to deal with, could therefore set it aside, I cannot possibly admit that it may not under some circumstances, be a decisive answer to a bill for specific performance." His Lordship has not, perhaps, sufficiently pointed his remark to the distinction between the two classes of cases;—it requiring very gross fraud to induce the court to set an agreement aside,—a very much smaller degree of this ingredient being sufficient to induce it to refuse relief at the instance of a party, who has acted fraudulently, though only to a small extent. Without keeping this distinc-

(x) In *Drewe v. Hanson*, 6 Ves. 678.

(y) The suit was in Exchequer, and Lord Redesdale mentioning it, as a cause and cross cause, expressly states that "the court refused to confirm the contract." 1 Bro. C. C. 5th ed. p. 440, n. (2.)

(z) 14 Ves. 526.

(a) *Lord Irnham v. Child*, 1 Bro. C. C. 95.

tion constantly in view, it is impossible duly to understand and appreciate the effect of the almost countless decisions on questions arising out of contracts ignorantly or fraudulently entered into; and therefore it is always important, in the first place, to consider whether the suit be instituted to enforce a contract, or set it aside.

Of course the mere fact of the purchase being made in the name of a trustee can be no ground for *resisting performance, that [*99] being the way in which a vast proportion of purchases are effected: nor will the mere circumstance of there having been a quarrel, between [the vendor and the person for whom the purchase is made, have any such effect, where that quarrel is unconnected with the subject of the contract.(b)

The class of cases which have been thus far considered, under the head of misrepresentation, and its kindred topics, have all involved, more or less, fraud as an ingredient. Where this ingredient enters, specific performance cannot be enforced. There is another very extensive class of cases of a similar character, which are commonly spoken of under the head of mis-description; but which differ from the former in this respect, that though the actual state of the property does not agree with the representation or description of it contained in the agreement, yet the variation having arisen from a due want of care in ascertaining the exact state of the property or the title to it, and not from any fraudulent intention to mislead, the court will, in certain cases, decree specific performance, with compensation to the purchaser for so much as the actual condition of the property comes short of the description contained in the particulars of sale or the agreement.(c)

*The distinction may, perhaps, be stated thus, that where there are no *indicia* of fraud, and the misdescription goes [*100] only to a part of the estate, and is of such a nature as not to prejudice the full enjoyment of the residue, or the objects which the purchaser had specially in view in making the purchase, then the court will enforce the contract with compensation; but if the misdescription goes to the whole estate, and is such that the purchaser with ordinary care could not have discovered the error, and was, at all events, not previously acquainted with it, then the court will not enforce the contract.

The origin of the jurisdiction as to compensation may be thus explained. The principles on which courts of equity act in suits for specific performance, is this, that the law, giving a good title, but from the mode in which justice is there administered not being capable of giving a complete remedy, the Court of Chancery interposes and supplies this defect by granting a performance of the contract *in specie*. In strictness it is obvious, that this jurisdiction would be limited to cases where the subject matter of the sale exactly corresponded with the description of it in the contract. Had the Court of Chancery confined itself to

(b) Hall v. Warren, 9 Ves. 608.

(c) That quit rents are subjects of compensation and rent-charges when of *small amount*, see Esdaile v. Stephenson, 1 Sim. & Stu. 122; but they should always be noticed in the agreement or conditions of sale; and see Wood v. Bernal, 19 Ves. 220.

cases of this description, it is obvious that the equity jurisdiction would have been limited and impaired so as to have been almost useless; and, therefore, acting upon the principle, that the forms of law shall not be made the instrument of injustice, the court will not allow a party to [*101] avail himself unconscientiously of the rule, that "the subject matter of sale should exactly agree with the description given by the vendor; but where the contract is capable of being substantially performed, will compel the purchaser to accept compensation for any little deficiency there may be in the quantity or quality of the estate. As if the contract was for a term of 99 years in a farm, and the vendor had only 97 or 98 years; this difference being so slight as not substantially to affect the bargain, the court interferes by decreeing specific performance with compensation for what the vendor cannot give. So upon a contract for the lease of a farm with immediate possession, and six months of the old lease are unexpired, the lessee may not want it immediately, he might not look to an immediate entry; and in that case also equity would on the same principle of compensation interfere. (c)

In *Dyer v. Hargrave*, (d) Sir W. Grant, speaking with reference to the doctrine of compensation, says, "the principle is, that if the purchaser gets substantially that for which he bargains, he must take a compensation for the deficiency in value. Whether the court has not in many cases gone beyond the spirit of that rule is another consideration? Whether the court ought to compel a defendant to take compensation

[*102] "for that which can hardly be estimated by pecuniary value, may admit of doubt?" In the state of the authorities as they then existed, this learned judge, so remarkable for his plain good sense, was very naturally led to put these questions; but since that time the cases, to which he was alluding, have, from more correct reports, become better understood, and we see that they did not admit of the construction which was so often put upon them, both from the bench and at the bar. It may now, perhaps, be laid down as a broad and clearly defined principle, that in no case will a purchaser be compelled to complete, when he cannot get substantially what he bargained for, and where the deficiency, for which he is compelled to accept compensation, cannot be clearly estimated in pecuniary value.

The older cases on the subject of compensation as they were stated in the then current reports of them, went, it cannot be doubted, a great

[*103] deal too far; (e) it "being clear, that the principles of compensation ought never to be applied to matters which are of

(c) "This" says Lord Erskine, "is the perfection of our jurisdiction. If the rigid construction of the law were relaxed, there would be no safety; but the system is rendered perfect by this healing power of equity; preserving the substantial part of the contract, but not forcing upon the party something different; and the effect is substantial justice." (*Halsey v. Grant*, 13 Ves. 77.)

(d) 10 Ves. 507.

(e) "It is certainly to be observed, that under the head of specific performance, contracts substantially different from those entered into have been enforced. In the case of a contract for a house and a wharf, the object of the purchaser being to carry on his business at the wharf, it was considered that this court was specifically performing that man's contract by giving him the house without the wharf. So in *Shirley v. Davis*, in the Court of the Exchequer, the subject of the contract was a house on the north side of the river Thames, supposed to be in the county of Essex; but which turned out to be in Kent; a small part of

the substance of the contract. In the case of the wharfinger(*f*) assuming the current statement of it to be correct, which may well be doubted, when we recollect the error which so long prevailed with respect to Lord Stanhope's case, the court made itself a party to an act of great injustice.

Where the vendor can only make a title to part of the estate sold, it depends upon the materiality of the *part to which no title can be made, whether the contract can or cannot be enforced. [*104]

In *Poole v. Shergold*, Lord Kenyon, M. R. expresses himself to be clearly of opinion, that a case might be made where, if it turned out that if a seller could not make a good title to a part, it might be a sufficient reason to put an end to the whole contract: in one report of his judgment(*g*) he instances the wharfinger's case as being one of this description, and according to another report(*h*) instances the case of a purchase made of a mansion-house in one lot, and farms, &c. in the others, and no title could be made to the lot containing the mansion-house, and says that "it would be a ground to rescind the whole contract."

The true question whenever a case of this description occurs is this, whether the part to which a title cannot be made be essential to the enjoyment of the rest of the estate; or, whether the part to which no title can be made was the purchaser's principal object, or equally his object with the part to which a title can be made? The court in either case, will not, it seems, decree specific performance. But on the other hand, if the part to which a good title can be made was the principal object of the purchaser, and the enjoyment of it, or the purposes contemplated by the purchaser, are not such as can be prejudiced by the defect as to the other part, then it seems, that the purchaser will be *compelled to complete with a compensation for the defect. [*105]

Where a purchaser buys several lots, to some of which a good title cannot be made, this circumstance will afford no objection to a specific performance as to the other lots, unless there be something in the par-

which county happens to be on the other side of the river. The purchaser was told he would be made a church-warden of Greenwich; and though his object was to be a freeholder of Essex, he was compelled to take it. So in Lord Stanhope's case, the object was to get an estate tithe free; and yet Lord Thurlow obliged him to take it subject to tithes." (Per Lord Eldon in *Drewe v. Hanson*. 6 Ves. 678.) So again in *Seton v. Slade*, this statement is repeated in very nearly the same words, after which his lordship adds "the value of the tithes is not a [proper subject for] compensation." And see also *Steward v. Alliston*, (1 Mer. 32,) where Lord Eldon again adverts to these cases. With respect, however, to the two last of them it is remarkable that Lord Eldon's observations proceeded on defective or erroneous reports of them,—neither of these cases when correctly stated, being open to his observations. As to *Shirley v. Davis*, see *ante*, p. 96. As to Lord Stanhope's case, see *post*, p. 107; with respect to the Wharfinger's case, that probably also, if we had any authentic account of it, might be as little open to any remark.

(*f*) "Such was the case of the Cambridge Wharf, where it appeared, that the seller could make a good title to all the estate *but the wharf*, which was the principal object of the buyer in making the agreement. In that case the buyer was compelled to complete his purchase without the wharf; but it was a determination contrary to all justice and reason." Per Lord Kenyon, in *Poole v. Shergold*, 1 Cox, 274.

(*g*) 1 Cox, 274.

(*h*) 2 Bro. C. C. 119, and see *Bowyer v. Bright*, McClell. 419.

(*i*) *Knatchbull v. Grueber*, 1 Madd. 153; *Bowyer v. Bright*, 13 Price, 698; *M'Queen v. Farquhar*, 11 Ves. 467.

ticular connection, and relative situation of the several lots which makes it unreasonable to compel a purchaser to take those to which a good title can be made; as where, from the nature of the property, it appears obvious that he could not have intended to purchase part of the lots without the others.(i)

A different rule prevails where a good title cannot be made to an undivided part of an estate sold in one lot, such a defect going clearly to the whole estate; and accordingly in this case it is clearly settled, that specific performance cannot be enforced.(k) And, therefore, in a recent case, where the purchaser had contracted for the entirety of an estate, as to one undivided seventh-part of which a good title was not made, the sale being under a decree, the purchaser was discharged on motion, although, before the motion was made, the title had been cleared by getting a release from the party whose claim had affected it.(l)

[*106] *Where the estate is described as freehold, the purchaser will not be compelled to accept a leasehold, however long the term may be. Sir W. Grant, in deciding this point, said, "when the party gets substantially that for which he contracts, any small difference may be remedied by compensation; but not where it extends to the whole estate;"(m) neither will a purchaser be compelled to accept a copyhold in lieu of a freehold, although, if the vendor offered to procure an enfranchisement, it is probable, notwithstanding the case of *Sir Harry Hick v. Phillips*,(n) that the court would allow time for this purpose.

It is now clearly settled that the purchaser of an estate, described as being tithe-free, cannot be compelled to take it, subject to tithe, upon terms of compensation;(o) because it is to be presumed that in such cases the vendee means to purchase an exemption from litigation, and the value of such exemption being matter of personal opinion, there is no principle on which the want of it can be estimated in pecuniary value. In applying this principle, however, the court will not permit itself to be *fettered by the mere words of the rule; but if [*107] it can see that the purchaser gets substantially what he has contracted for, will compel him to complete, although, in strictness, the estate may not be tithe-free. Thus, in *Lord Stanhope's case*,(p) the agreement was for the purchase of an estate described in the particulars as tithe-free; in point of fact, the estate in question was, together with some other lands, liable to an annual payment of about £14 in lieu of

(i) *Poole v. Shergold*, 2 Bro. C. C. 118; S. C. 1 Cox, 373; *Lewin v. Guest*, 1 Russ. 330.

(k) *Roffey v. Shallcross*, 4 Madd. 227.

(l) *Dalby v. Pullen*, 3 Sim. 29.

(m) *Drews v. Corp.*, 9 Ves. 368. See *Wright v. Howard*, 1 Sim. & Stu. 201, n.

(n) *Proc. Ch.* 575. In this case the vendor offered to get the copyholds enfranchised, but the court refused to give time, principally, as it would appear, on the ground of the unreasonableness of the price. And see *Twining v. Morrice*, 2 Bro. C. C. 326.

(o) *Ker v. Cloberry*, cited 2 Swanst. 223. See *Smith v. Tolcher*, 4 Russ. 302.

(p) 1 Cox, 59, under the name of *Howland v. Norris*; this case, on the faith of an erroneous report, as stated in 6 Ves. 678, has been frequently referred to as an authority for the proposition that the court would compel specific performance of an agreement to purchase an estate subject to tithes, although described as tithe-free, and though the specific object of the purchaser was to have an estate tithe-free. The decision, under this misapprehension, has been frequently disapproved.

tithes. Lord Thurlow after stating the rule as to compensation to be, "that wherever it is possible to compensate the purchaser for any article which diminishes the value of the subject matter he must be satisfied with such compensation, or, to speak in the usual terms, wherever the matter lies in compensation; but I cannot lay down this rule as universal, for a case may be so circumstanced that the party may have purchased, purely for the sake of the very particular wanting. The case of the wharf was nearly this: and if I was to have judged of that case, and if it had appeared that the purchaser was in a trade in which that wharf was essentially useful, and that he made his purchase for the sake of his trade, *I should not have thought, that it interfered with the general rule, if I had discharged him from his contract, and [*108] other cases may be put of a similar nature; but wherever the general doctrine will apply, the remedy must be in compensation;" held this case to lie within the rule, and ordered specific performance, with compensation. So in the recent case of *Binks v. Lord Rokeby*, (g) where the particulars of sale stated, that the estate consisted of about a hundred and forty acres, of which about thirty-two were tithe-free, and no sufficient evidence of any part being tithe-free was produced. Lord Eldon held, that the principle, which protects a vendee where he purchases an estate tithe-free, did not apply to this case; and he explained the reason of his judgment thus:—"If this had been a case in which the greater part of the lands sold had been subject to tithe, I should not have followed the doctrine, that the purchaser of an estate, described as exempt from tithe, shall be compelled to take it subject to tithe; but where only a small part was described as exempt, and the fourth condition of sale expressly stipulated, that errors in description should not vitiate the sale, I was therefore of opinion that the purchaser must accept the estate."

So in *Drewe v. Hanson*, (r) where the agreement was for the purchase of an estate, consisting of some farms and also certain tithes described in the particulars of sale, as "the valuable corn and hay-tithes, of the whole parish of Bishop's Lincomb;" it ap- [*109] pearing that the corn-tithes were paid by an annual composition, that the hay-tithes, as to one half, belonged to the vicar, and as to the other half were commuted by an annual payment of £2, the purchaser refused to complete, and brought his action to recover his deposit; whereupon the vendor filed a bill for specific performance, and the case came before the court, on a motion to dissolve the injunction to stay proceedings at law. It seems that the corn tithe was the principal part of the estate, and that the farms were purchased for the purpose of enjoying the corn-tithe estate. The answer also stated that the tenants had converted arable to meadow, and threatened to convert more. It was not necessary on this motion to decide the question, whether the purchaser should be compelled to take the estate subject to compensation; but the leaning of Lord Eldon's opinion, and the circumstances on which he would finally have formed his judgment, may be pretty plainly inferred from his concluding observations:—"Suppose it proved that this farm was taken for the purpose of enjoying the corn-tithe principally, that the hay-tithe was a very small object, great part of that capable of being

taken in kind; but a small part, not much affecting the bargain liable to an exemption or modus, the court, in such a case, might decree upon the doctrine of compensation. But it will be very different if it turns out upon examination, that one or two thousand acres are capable of being [*110] converted to the purpose of producing hay; or that a part, or the *whole, may be converted from arable to meadow. All those considerations are very material upon the question of compensation; and it is impossible to determine now, that this will not be, within the reach of some of the authorities, a case for compensation;" and on these grounds the injunction was continued.

In particulars or agreements for the sale of lands, it very frequently happens that the quantity is misstated; the number of acres, as ascertained by estimation, differing very commonly from the number as ascertained by an actual survey and admeasurement. The particulars, probably, describe the estate as containing so many acres, "more or less," or as "by estimation," containing "so many acres more or less," with a condition that if there should actually be more or less, the contract is not to be affected by this circumstance; the vendor not to claim an increase of the purchase-money, if the actual quantity should be more, nor the purchaser to claim compensation if there should be less. In such a case a small difference, as for example, an acre or two in a farm containing a hundred, either way, would not be a ground for resisting the contract, or claiming compensation on the one hand, or an increase of the purchase-money on the other.

[*111] In *Hill v. Buckley*,^(s) Sir W. Grant has stated *generally the principle, on which cases of this description are to be decided. Where, observes His Honour, a misrepresentation is made as to the quantity, though innocently, I apprehend the right of the purchaser to be, to have what the vendor can give; with an abatement out of the purchase-money for so much as the quantity falls short of the representation. This is the rule generally; as though the land is neither bought nor sold professedly by the acre, the presumption is, that in fixing the price, regard was had on both sides to the quantity which both suppose the estate to consist of. The demand of the vendor and the offer of the purchaser, are supposed to be influenced in an equal degree by the quantity, which both believe to be the subject of their bargain; therefore, a rateable abatement of price will, probably leave both in nearly the same relative situation in which they would have stood if the true quantity had been originally known.

In *Winch v. Winchester*,^(t) the particular described the estate as "containing by estimation forty-one acres, be the same more or less." Sir W. Grant said, "the effect of the words 'more or less,' added to the statement of quantity, has never been yet absolutely fixed by decision; being considered sometimes as extending only to cover a small difference, the one way or the other; sometimes as leaving the property altogether [*112] uncertain, and throwing *upon the purchaser the necessity of satisfying himself with regard to it. In this instance the

(s) 17 Ves. 401.

(t) 1 Ves. and Bea. 375.

description is rendered still more loose by the addition of the words 'by estimation.' The estimated extent of ground frequently proves quite different from its contents by actual admeasurement. It cannot be contended, that the words 'estimated' and 'measured' have the same meaning. If a man were told that a piece of land was never measured, but is estimated to contain forty-one acres, would that representation be falsified by showing, that when measured, it did not contain the specified number of acres? The only contradiction to that proposition would be, that it had not been estimated to contain so much." In a suit for specific performance, the defendant submitted to perform the agreement with an abatement for the deficiency of land, relying in support of his claim for abatement, upon (among other things as to which the evidence was not quite clear) a declaration of the auctioneer in reply to a question publicly asked, that the quantity of land was "forty-one acres," adding "if the purchaser does not like to take it so, it shall be measured, and if it prove more, the excess must be paid for; if less, an abatement must be made;" which declaration was not, on the evidence, denied by the auctioneer. Under these circumstances Sir W. Grant was of opinion, that the defendant could not be compelled to take the land without an abatement.

There are other circumstances besides direct evidence, which would equally induce the court to *grant an abatement; as for example, in a case where the vendor can be proved to have known [*113] the exact quantity, he would not be allowed under the terms "more or less" to have the benefit of probably even a very small difference.(u) Nor would he be allowed the benefit of such difference, when from the form of the particulars a purchaser would naturally be led to adopt the inference, that the quantity had been ascertained, and was specified with great regard to exactness; thus, in a recent case,(v) the estate was described, as "containing the several quantities aftermentioned, that is to say by the plan drawn by ———, in the year 1792;" and then proceeding to specify the number and particular quantities of each close, and concluding "containing altogether *about* 101 A. 4 R. 29 P." There was a deficiency of 2 acres in two closes described, as containing altogether 8 A. 1 R. 4 P.; and the court held the purchaser to be entitled to an abatement, as the quantity of each close was specified. A deficiency of 2 acres on the whole farm, and made up of little differences in the several closes of which it consisted, would probably not have afforded any ground for abatement; inasmuch as between two surveys, the difference might have amounted to so much without imputing blame in any quarter, and one survey might in such a case be as nearly correct as the other. But an error of 2 acres in two fields, containing together only 8 acres was so clearly the result of mistake, or a culpable degree of *negli- [*114] gence, as on the commonest principles of justice to entitle the purchaser to compensation in a case, where from the minute particularization of the quantity down to perches, it was impossible he could expect to find a deficiency of such a nature.

In *Portman v. Mill*,(w) the defendant contracted with the plaintiff for the purchase of a farm, "containing by estimation 349 acres, or thereabouts, be the same more or less." There was in the agreement a stipu-

(u) *Winch v. Winchester*, 1 Ves. and Bea. 377. †

(v) *Gell v. Watson*, 16th Nov. 1825, M8.

(w) 2 Russ. 570.

lation "that the parties should not be answerable or accountable for any excess or deficiency in the quantity of the said premises, and that such excess or deficiency (if any there should happen to be) should not vacate or affect the contract, but that the premises should be taken at the quantity above stated whether more or less." The actual quantity of land appeared to be about 196 statute acres, exclusive of about 50 acres of woodland, so that if the statement in the contract was to be interpreted as referring to statute acres, there was a very great deficiency in the quantity. It was stated in the bill filed by the vendors that the term *acres* in the contract meant *customary* not *statute* acres; that the defendant was well acquainted with the actual extent of the lands, and that having entered upon the farm he remained long in possession of it and dealt with it in every respect as his own property. The defendant in his answer, among other things alleged, that he understood the estimate of [*115] quantity contained in the agreement as *referring to statute acres, and that he would not have bought the property, if he had supposed that customary acres were meant; that he had taken possession only upon the faith that the contract was to be performed by showing a good title to the quantity of land mentioned in it, and that he had abandoned the possession as soon as he had discovered the great deficiency in the value.

The question with respect to this misdescription came before the court, incidentally, on a motion for a reference of title on the coming in of the answer,—the question being whether this misdescription was such as to bring the case within the general rule that there shall not be a reference where there are other matters in dispute,—so that it was not necessary to decide expressly, whether it would have been a fatal objection to the performance of the contract, although it cannot be doubted that such would have been its effect, unless qualified by the acts of the parties. Lord Eldon's observations however, bear closely upon the general effect of such misdescription,—“on the face of the contract,” observed his Lordship, “the vendor proposes to sell the vendee a farm containing by estimation 349 acres, or thereabouts, and one question is, what the word *acre* in the agreement means? The defendant says he understood it to mean statute acres; the plaintiff alleges, that he meant only customary acres, which, according to the custom of that part of the country, do not contain much more than one half of the quantity of an equal number of [*116] statute acres. As to the stipulation *in the contract,—that the parties shall not be answerable for any excess or deficiency in the quantity of the land, and that the premises shall be taken at the quantity before stated,—I never can agree that such a clause (if there were nothing else in the case) would cover so large a deficiency in the number of acres as is alleged to exist here.”

Where a leasehold interest is offered for sale, and described as consisting of so many years “the residue of a term,” whereas it consists in fact only of a few years of an old term, and a reversionary term granted by another person, this is such a misdescription of the vendor's interest as precludes his right to a specific performance, unless he will produce the original lessor's title. This, it will be observed, is a sort of qualified ground of objection, and springs rather from the vendor's unwillingness to produce the lessor's title than from the bare effect of misdescription.

The point underwent great consideration in the two cases of *White v. Foljambe*,^(x) and *Deverell v. Lord Bolton*.^(y) The cases were very nearly similar in circumstances. In the latter case the contract took place in 1810, and the particular represented the plaintiff's interest in the premises generally as an unexpired term of 58 years, that interest being, in fact, the residue of a term of twenty-one years, commencing from Lady-day, 1732, granted by Sir Thomas Grosvenor, and of a farther term of *forty-five years and a half, demised by General [*117] Grosvenor by a reversionary lease, bearing date the 9th Dec. 1805, and to commence from Lady-day 1823, when the former lease would expire. The purchaser called for the original lessor's title, which the plaintiff could not produce, either to the original or the reversionary lease, upon which Lord Eldon said, "the question is whether under these circumstances this is an objection, not to the validity of the contract, but to relief in this court by a decree for specific performance? I have not the least doubt that if a house is put up to sale by the description of the residue of a term of fifty-eight years, and it proves to be the residue of a term of ninety-one years granted near a century ago, and a reversionary term of forty-five years, to commence thirteen or fourteen years after the contract, it is utterly impossible that the purchaser could either be called upon in this court to accept such a title, or be subject to an action."^(z) The case, however, was ultimately decided on another ground, so that it became unnecessary to consider what would have been the effect of this bare misdescription as a ground for resisting a decree.

In *Spratt v. Jeffery*,^(a) it appeared that on the 23d April, 1828, the plaintiff and defendant entered into an agreement, which so far as is material to be here stated was in the following words:—"William *Jeffery, of Newington Butts, Surry, victualler, doth [*118] agree to sell unto William Spratt, of Shadwell, *the two leases* and goodwill in trade of the house and premises now occupied by him, known by the sign of the Rockingham Arms, and shop adjoining, situated at Newington Butts, in the parish of St. Mary, in the county of Surry, aforesaid, for the sum of £4,250, *as he holds the same* for the term of twenty-eight years from Midsummer next ensuing, at the annual rent of £126, and under fair and usual covenants only." The property in question was held under two leases, one being a lease in possession and valid, the other a lease granted in reversion and with a premium, under a power enabling only the grant of leases in possession at rack-rent and was consequently void. It was contended on behalf of the purchaser, that if the words "*as he holds the same*" were considered as referring to the title and not to the occupation of the defendant, it was a misdescription; for he did not hold the premises under the two leases, inasmuch as the whole was held under the first lease, the second being a lease in reversion; the defendant had, therefore, misdescribed in the contract the interest which he had, and could not insist upon making the plaintiff take it. But the court held clearly that this was no misdescription; Bayley, J., saying, "the defendant agrees to sell, not the premises for a given term, but the

(x) 11 Ves. 337.

(z) 18 Ves. 509.

(y) 18 Ves. 505.

(a) 10 Barn. and Cresc. 249.

two leases and good will in trade of the premises, at a certain sum as he [*119] holds the same for terms of 28 years. One objection made *on behalf of the plaintiff is, that this being a bargain to sell two leases for the term of twenty-eight years, the leases must be taken to be concurrent and not consecutive leases, and that consequently the defendant contracted to sell that which he had not. Two cases were cited on this point, but in each of them the language of the contract was very different; in each the bargain was to sell the residue of a *term*. Here it is to sell *two leases* and the rent being one, any lawyer would at once conclude that the leases were consecutive."

Where the estate to be sold is copyhold, the vendor will not be bound to show the identity between the description in the particulars, and that which appears on the court rolls, provided he can show that the estate which he professes to sell has always, or at least for a period of sixty years, been enjoyed according to the description in the particulars. Thus, in *Long v. Collier*, (b) the description of the property on the court rolls was as follows: "one messuage and half-yard land, containing ten acres, two tofts of land, one messuage, and one yard land, one cottage with a garden, two acres of arable land and pasture, one croft and one close, containing twenty-one acres, and one close containing twelve acres, and the rents of the Buddle of Chilcombe." The description in the particulars was, "All that capital messuage, tenement, or farm-house, barns, stables, cart-houses, sheds, out-buildings, farm-lands, hereditaments and premises, [*120] containing by admeasurement *219 acres more or less."

The defendant attempted to make out that the description on the court rolls covered only sixty-seven acres, or at most, by some variation in the calculation, seventy-one acres, and could not be made to apply to 219 acres. On the part of the plaintiff evidence was given that the farm in question had passed through a succession of proprietors to the plaintiff by the description which now appeared on the court rolls, and under such description had been held by the occupiers for the time being for upwards of sixty years past. Sir J. Leach, M. R., was of opinion "that the computation of quantity made by the defendant was in a great degree fanciful; that the generality and vagueness of descriptions on court rolls were too well known to entitle such a computation to any weight; and that it was well established by the evidence in this case, that the property which was the subject of dispute had continually passed and been enjoyed by the description contained in the court roll," and overruled the purchaser's exception to the title.

Where the misdescription is so manifest, that the purchaser, by ordinary care and inquiry, could not have failed to discover it, this will afford no ground for refusing to complete the contract. Thus, in *Bowles v. Round*, (c) it was held to be no objection to specific performance, that the meadow which was the subject of sale had one footpath across and another around it; Lord Loughborough *saying, "I cannot [*121] help the carelessness of the purchaser, who does not choose to inquire; it is not a *latent* defect." But when the vendor gives a false

(b) 4 Russ. 267.

(c) 5 Ves. 508.

description, the purchaser cannot, in equity, be compelled to complete; and at law may rescind the contract, or, in other words, recover his deposit. Thus, in the case of the Duke of Norfolk v. Worthy,^(d) where the estate was described as being *one mile* from Horsham, being in fact *three or four miles* distant from that place, the purchaser recovered his deposit, Lord Ellenborough saying, "that in cases of this sort he should always require an ample and substantial performance of the particulars of sale, unless they were specifically qualified. Here there was a clause inserted providing, that an error in the description of the premises should not vitiate the sale, but that an allowance should be made for it. This he conceived was meant to guard against unintentional errors, not to compel the purchaser to complete the contract if he had been designedly misled." His Lordship therefore left it to the jury, whether this was merely an erroneous statement, or the misdescription was wilfully introduced to make the land appear more valuable from being in the neighbourhood of a borough town; in the former case the contract remained in force, but in the latter the plaintiff was to be relieved from it, and was entitled to recover back his deposit.

So in *Leach v. Mullett*,^(e) which was a sale by *public auction, the particulars described two houses as Nos. 3 and 4, [*122] instead of Nos. 2 and 3, but the names of the owners were correctly stated; it was also stated that the taxes of No. 3 were paid by the tenant, whereas they were farmed by the landlord. It appeared that Nos. 2 and 4 were of the same description of houses, but No. 4 in rather better repair. On an action against the auctioneer to recover back the deposit, Best, C. J., said, "I quite agree with the law as laid down by Lord Ellenborough.^(f) If it is a mere error or mis-statement from error, then it is cured by the conditions: but there must be this limitation, if the description is of any other property than that intended to be sold, though it is made by error, the conditions do not cure it. If the plaintiff had intended to buy the house sold, notwithstanding the misdescription, I should have thought that you would be justified in finding your verdict for the defendant; for I should not suffer the plaintiff to take advantage of a mistake by which he was not prejudiced. . . . If it was a pure mistake, not prejudicing the party, it would be cured by the conditions; but I think that auctioneers ought to be narrowly watched, lest, under the idea of mistake, they cover material matters."

Where the misdescription is of so vague and indefinite a character that it would have put a person of ordinary discretion upon enquiry, the court will apply the maxim *caveat emptor*; as where the representation was, that the property was leasehold, *renewable on payment [*123] of a small fine, or that the estate was nearly equal to freehold, these representations are such as ought to put the purchaser upon enquiry; but even vague and indefinite representations like these may, in connection with other circumstances, assume such a character as to become fraudulent; as when the vendor making such indefinite representations knew, in fact, that the fine was large, or that the purchaser entertained a different idea of the fine, they would be grounds for rescind-

(d) 1 Camp. 337.

(e) 3 Carr. & Payn. 115.

(f) In the Duke of Norfolk v. Worthy, 1 Camp. 337.

ing the contract. Thus in *Fenton v. Browne*,^(g) the property was leasehold, held under Magdalen College, Oxford; and the particulars described the estate to be of nearly equal value with freehold, being held by a College Lease, for 33 years, from the 6th August, 1791, at a ground-rent of £3 7s., and renewable every ten years, upon payment of a small fine: the evidence of the agent being, that upon being asked by the defendant as to the amount of the fine, said, he could not tell; only stating, from information, the amount of the fine last paid; and refusing expressly, though pressed by the defendant to guarantee that it should not exceed £150, which sum he offered to give towards it, if the vendor would pay the remainder. The fine demanded by the College was about £700. The original suit was instituted in May 1803. The question ultimately came before the court in the shape of a cause and cross-cause, the original

[*124] cause being by the vendor for specific performance,—the cross-cause by the purchaser, for specific performance, and compensation in respect of the difference between £150, the fine alleged to be payable, and the fine that should be actually required. Sir W. Grant, after laying down the effect of indefinite representation, as above stated, said that the agent's refusal to guarantee the amount of the fine as below £150, ought to have put the purchaser upon enquiry. His Honour held, therefore, First, that the purchaser had not brought himself within any rule to avoid the contract; Second, if he had he could only have rescinded it. The first proposition is very clear, the second is not quite so obvious, because it would appear that circumstances which are sufficiently strong to entitle the purchaser to rescind the contract, would, at least, afford sufficient ground to resist specific performance. His Honour's proposition, however, will be sufficiently intelligible if we have regard to the nature of the suit,—and to the relief sought by the purchaser. The purchaser did not say "there has been misrepresentation; and therefore I cannot be compelled to complete," but he said "there has been misrepresentation, and I seek to have the contract completed, with a deduction out of the purchase-money to the amount of that misrepresentation,"—a species of relief to which a purchaser is not entitled, where the effect of the misrepresentation is so considerable, as it was in this case. It is therefore simply with reference to the particular circumstances of this case, that his Honour's proposition, *that the [*125] purchaser could only have rescinded the contract must be understood.

Where the estate purchased consists of land, and this is represented falsely to be in a state of high cultivation, or of houses which are stated to be in good repair, not being so, these circumstances of misrepresentation will be subjects of compensation, unless there be something very special in the case; as if the house had been purchased for immediate residence, and, in consequence of the state of the repairs, that object was defeated, the court might refuse to enforce the contract with compensation. The circumstances, however, must be very strong which would induce the court so to act, because if a purchaser wanted to have a house for immediate residence, it would plainly be his duty to make proper enquiry.

Thus where the subject of sale was an Advowson, and the particulars

(g) 14 Ves. 144.

contained a description of the situation, number of acres, &c., adding "avoidance of this perferment is likely to occur soon," but made no mention of the incumbent; it was stated, in explanation, by the auctioneer, "that the living would be void on the death of a person aged eighty-two." In point of fact the then incumbent was only thirty-two, and expected to be presented to another living, on the death of its incumbent, who was eighty-two. On a bill by the vendor, Sir W. Grant decreed specific performance, saying, that he "thought the representation made by the printed particulars so vague and indefinite, that the court could not take *notice of it judicially, and that its only [*126] effect ought to have been to put the defendant upon making inquiries respecting the circumstances, under which the alleged avoidance was likely to take place, previous to his becoming the purchaser. That such a representation was capable of being supported by the fact either of the incumbent being old or infirm, or by various collateral circumstances. His Honour compared this representation to that made in a case lately before him, respecting the purchase of a leasehold estate, which was stated in the particulars to be renewable 'on the payment of a small fine;' leading to the question, 'What is a small fine?' with reference to the circumstances of the property, and the expression being so vague that no importance whatever could be attached to it.(h)

So when the particulars of sale described the premises as "a copyhold estate, consisting of seven dwelling houses with gardens, on a ground-rent lease, at 40 guineas a year," the premises in question being in fact let on a lease in the ordinary way at rack-rent; Lord Eldon held, that "the subject of the contract did not answer the vendor's description of it; and that in a point so material as to exclude the doctrine of compensation."(i)

Where a purchaser contracts for an estate under a false description, and with a knowledge that the description was false, in such a case the court will neither suffer him to be off his bargain, nor grant *him compensation. This was settled in *Dyer v. Hargrave*.(k) [*127] In that case the estate was represented as lying within a ring-fence. Sir W. Grant in giving judgment, after alluding to some other misrepresentations, which clearly laid in compensation, proceeded thus:—"It is not quite so certain that a precise pecuniary value could be set upon the difference between a farm, compact, in a ring fence, and one scattered and dispersed with other lands; but in this instance, the purchaser is clearly excluded from insisting upon that, as an objection to complete the contract. He saw the farm before he purchased; he was willing to purchase it by private contract: he had lived in the neighbourhood all his life. This variance is the object of sense. He must have known whether the farm did lie in a ring-fence, or not. It is sworn by one witness that it was distinctly pointed out to him, that there were fields belonging to other persons lying intermixed. But independent of that he could not conceive himself purchasing any thing in a ring-fence, for the evidence of his own witnesses shows, that there are 30 or 40 acres of others intermixed above his 150 acres; and he does not pretend that he thought the farm larger than it turns out to be. He had repeated opportunities of going

(h) *Trower v. Newcome*, 3 Mer. 706.
(k) 10 Ves. 508.

(i) *Stewart v. Alliston*, 1 Mer. 26.

over the farm. If he acquiesces in the situation of what he purchased, and goes on with the treaty, he cannot afterwards get rid of the contract.

[*128] Whether compensation is to be made is a different consideration. Upon the same ground, that the defendant cannot get rid of the contract on account of the difference in the description of the farm, he cannot be entitled to compensation, for it was an object of sense. He could not be deceived. He could not have an imperfect knowledge, for if he had any knowledge that anything was mixed with the subject of his purchase, that puts an end to the description, and if I give him compensation, having that knowledge, he gets a double allowance; for if he has knowledge that what he proposes to purchase does not answer the description, it must be taken that he bids so much the less."

A condition in the articles "that any error in the description shall not vitiate the sale, but compensation shall be made," extends only to cases, which afford a principle on which compensation can be estimated. Thus, in a case where the property was described as "the reversion of £2000 after the death of a person aged sixty-six," and by a memorandum in writing on the back of the particulars made at the time of the sale, it was stated, that if the party on whose life the reversion was dependent should have children, the reversion would be defeated. In point of fact the party, on whose death the reversion was expectant, was only of the age of sixty-four, and Lord Tenterden, under the circumstances of this case, expressed himself to be clearly of opinion that this objection was fatal. His Lordship said, "In the case of a reversion simply expectant on the

[*129] death of an individual, if a mistake be made in his age, a compensation may be made under the condition, for the difference of value may be computed; but where there is an *additional contingency*, such as that of the birth of future children, in this case the difference of age alters the likelihood of that contingency, and in such a case, therefore, no estimate can possibly be made of the difference of value between the thing described and the thing sold, and the contract itself must be vacated." (l)

It has been already observed, that where either party to a contract refuses to perform it, the other has a remedy either at law or in equity. The latter being for the most part so imperfect, and so partially adapted to the relief which the parties require, is, comparatively, but seldom resorted to. A very slight advertence to the nature and effect of legal remedies for breach of contract is all that could be properly introduced into these pages, and for the very little, which is intended to be said on this subject, the present seems to be the proper place. (m)

(l) *Sherwood v. Robins*, 1 Mood. & Malk. 194.

(m) A person contracting to sell an estate undertakes two things,—first, to perform the contract; second, to make a good title. He is equally guilty of a breach of his undertaking, by expressly refusing to complete, as by being unable to make a good title, or voluntarily placing himself in a situation which disables him from performing his agreement. With regard, however, to the purchaser's remedy at law, the effect of these two modes of refusal is different, and material to be attended to; inasmuch as, in the former case, the purchaser cannot bring his action to recover damages for breach of the contract without a previous tender of a conveyance, and the purchase-money;—in the latter, that is where a bad title is shown,

*Where the purchaser refuses to complete, the vendor can bring his action for breach of contract, *and if he have been guilty of no misconduct, and produce a clear title, will recover such damages, as, under the circumstances of the case [*130] [*131]

or the vendor has sold the estate to another person, so that he has incapacitated himself from completing the purchase, he may bring his action without such previous tender (Knight v. Crockford, 1 Esp. Ca. 189, see Duke of St. Albans v. Shore, 1 H. Bl. 270.)

Although the nature of the circumstances be such that equity cannot enforce the contract at the suit of the vendor, yet he may in some cases, even after his bill has been dismissed, bring his action at law for damages: but where it appears to the court that the vendor is entitled to relief at law, it is usual to dismiss his bill, without prejudice to his right to bring an action. Even if this direction be not added, the court will on a proper case restrain proceedings at law by injunction. When the purchaser's bill is dismissed, it is in no case necessary or proper to add such direction, because on whatever ground a bill at his suit may be dismissed, he retains his right to recover the deposit.

In agreements for purchase the intention of the parties must in general be, that the covenants to make a good title, and convey on the one side, and to pay the purchase-money on the other, shall be dependent; they are accordingly always so constructed by the courts in the absence of express stipulation to the contrary. At law, therefore, if either party wish to compel the other to observe the contract, or to recover from him damages for the breach of it, he first makes his part of the agreement precedent; for he cannot proceed against the other without having actually performed the contract, or done all, that in him lays, towards that purpose.

According to the universal practice of the profession, the conveyance is, in the absence of express agreement, prepared by the purchaser, a practice which has arisen out of the length and difficulties of modern titles and the refinements of modern conveyancing,—the more natural course appearing to be, that the conveyance should be prepared by the vendor. Contracts for sale generally provide expressly, that the vendor shall make out a good title, but whether there be or be not such express provision, the nature of the transaction necessarily implies that he shall do so. In pursuance of this agreement, whether express or implied, it is the duty of the vendor to exhibit the muniments of his title to the purchaser. Till a comparatively recent period, it was the practice for the vendor to hand over the deeds to the purchaser, and for the solicitor of the purchaser to prepare an abstract of them at his client's expense, such abstract being compared with the deeds themselves by the counsel before whom they were laid on behalf of the purchaser. As titles became more complex, by the increasing length of modern deeds and the multiplicity of their provisions, this practice gradually changed, and at the present day the abstract is always prepared by the vendor's solicitor and at the vendor's expense, unless there be an agreement to the contrary; the abstract is then handed over to the purchaser's solicitor, whose duty it is to compare it with the original deeds. To enable him to do so the vendor must produce the originals or procure access to them, and bear the expense of all journeys necessarily undertaken by the purchaser's solicitor for their examination.

The purchaser having satisfied himself as to the title, it would soon occur to the parties as being a very convenient course for the counsel who had investigated the title to prepare also the conveyance,—and it has now become the settled rule of the profession and a principle of the courts, that the conveyance shall be prepared by the purchaser.

It follows therefore that in ordinary cases of contracts for land, it is the duty of the vendor to make a good title, and execute or offer to execute the conveyance; it is the duty of the purchaser to tender a conveyance and the purchase-money.

Hence, then, it is not necessary for the vendor before he brings an action for the purchase-money to tender a conveyance, it is sufficient that he has executed the conveyance, or offered to execute, unless the purchaser have discharged him from so doing (Jones v. Barkley, Doug. 684; Phillips v. Fielding, 2 H. Bl. 123;) so, on the other hand a purchaser cannot maintain an action for his deposit, or damages otherwise sustained, without a previous tender of a conveyance and the purchase-money (1 Esp. Ca. 191; *ex parte* Hylliard, 1 Atk. 147,) except in the case of a naked refusal to proceed by the vendor.

Although, according to the practice of the profession, it is the business of the purchaser to prepare and tender the conveyance, and therefore it is clear on principle, that a vendor need not tender a conveyance previous to filing a bill or bringing an action, yet it is better that the question should not be raised; and accordingly it is always, except through accident or mistake, expressly provided by the agreement, that the conveyance shall be prepared by and at the expense of the purchaser, in which case it is clear by the terms of the contract, that the vendor may file his bill or bring his action without tendering a conveyance (Hawkins v.

- [*132] *he may appear to have sustained; but where an action for breach of contract is brought by the purchaser, he will, in general, recover only his deposit, and such expenses *as he may have been put to in investigating the title, but no damages for the loss of his bargain.
- [*133]
- [*134]

In contracts of purchase, the vendor and vendee, in the absence of special circumstances, are to be considered as acting at arm's length; and hence, although the vendor will not be allowed to practise any artifice for the purpose of concealing defects, or to make such representations as may have the effect of throwing the purchaser off his guard, yet, on the other hand, where the means of information as to the facts and circumstances affecting the value of the subject of sale, are equally accessible to both parties, and neither of them does or says any thing tending to impose upon the other, the disclosure of any superior knowledge, which one party may have over the other, is not requisite to the validity of the contract,⁽ⁿ⁾—there being no breach of any implied confidence, that

Kemp, 3 East, 410;) it has been decided, even, that where the agreement merely provides that the conveyance shall be at the expense of the purchaser, yet the purchaser, under such a direction, must also prepare the conveyance (*Seward v. Willock*, 5 East, 198.)

Where a purchaser has been let into possession under the agreement, or consistently with it, the relation of landlord and tenant is not thereby created; and hence it seems to be doubtful whether if the vendor should be unable to make a good title, he can in any case maintain an action against the purchaser for the intermediate profits (*Peake's Ca. 192*, *Kirtland v. Pounsett*, 2 Taunt. 45;) but, on the other hand, as the possession is lawful, and with the consent of the owner of the estate, ejectment does not lie against the purchaser without a demand of possession and refusal to quit (*Doe v. Jackson*, 1 Barn. & Cress. 448;) unless there was at the time of his taking possession, an agreement that he should quit, if he did not pay the purchase-money, on a given day, or the like; in which case, the agreement operating in the same manner as a clause of re-entry on breach of contract in a lease, ejectment will lie against the purchaser without notice on the non-performance of his agreement (*Doe v. Sayer*, 3 Camp. 8.)

In general, a court of law will not notice a trust, and so strictly is this rule observed, that a case directed from Chancery, will not be answered unless stated, as arising upon limitations of legal estates. Hence, having regard to this rule, it was for a long time a question whether, on an action by the purchaser for damages, it was competent for the court to notice equitable objections to the title.

Lord Kenyon actually held in one case (*Allpass v. Watkins*, 8 T. R. 516,) that where the purchaser is plaintiff, a court of law could not enter into equitable objections to the title; a decision, it will readily be admitted, sufficiently absurd, but it is now clearly settled that equitable objections will be noticed in an action for damages on the contract. In *Maberly v. Robins*, (1 Marsh. 358, 8 C. 5 Taunt. 625) *Gibbs, C. J.*, said, "The question is whether the contract were merely for a good title, or for a legal and equitable title. Now the words of the conditions are, that a good title shall be made out at the vendor's expense. What can the meaning of that be, except that there shall be a good title, both in law and equity? The vendor, therefore, not having made out a good equitable title, the contract on the part of the defendant is broken. It is true, that we are in a court of law; but we are on the question, whether the contract have been complied with. According to the defendant's doctrine, if an estate be devised to A. and B. in trust for C., it might be sold by A. and B. only, since they could give a legal title to it without the concurrence of C. And if this principle were to be followed up, the defendant might bring an action for the remainder of the purchase-money." The rest of the court concurred with this opinion. Mr. Justice Chambre observing that there was no reason why questions respecting equitable title should not come incidentally before a court of law.

If a purchaser seek to recover his deposit on the ground of an equitable objection, he must come, of course, with a trust clearly established, as matter of fact; for if he come with a doubtful equity, he must first get that established before he can seek upon such a ground to recover damages as for defect of title.

(n) See Chancellor Kent's Commentaries on American Law, 3 vol. 380, for a very able discussion of the mutual obligations of vendor and vendee; and see *Laidlaw v. Organ* (3 Wharton's Rep. 178,) there cited.

either party will not avail himself of his superior knowledge, because neither party reposes such confidence, unless specially tendered or required. "The common law," to adopt the language of Chancellor Kent, "affords to every one a reasonable protection against fraud in dealing; but *it does not go the romantic length of giving [*185] indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. It reconciles the claims of convenience with the duties of good faith to every extent compatible with the interests of commerce. This it does by requiring the purchaser to apply his attention to those particulars, which may be supposed within the reach of his observation and judgment, and the vendor to communicate those particulars, which cannot be supposed to be immediately within the reach of attention. If the purchaser be wanting in attention to these points, when attention would have been sufficient to protect him from surprise or imposition, the maxim *caveat emptor* ought to apply; even against this maxim he may provide by requiring the vendor to warrant that which the law would not imply to be warranted; and if the vendor be wanting in good faith, *fides servanda* is a rule equally enforced at law and in equity;" and, therefore, although the purchaser cannot recover damages on the contract, he may, if the contract has not been completed by actual conveyances and payment of the purchase-money, refuse to go on, and equity will not interpose against him; and if the contract have been actually completed he may recover damages in an action on the case. Thus, in *Pickering v. Dawson*, (o) Gibbs, J., mentions a case of the sale of a house in South Audley Street, *where the seller being [*136] conscious of a defect in a main wall, plaistered it up and perished it over; and it was held, that as the vendor had expressly concealed it, the purchaser might recover.

It will make no difference that the misrepresentation relates to matters, of which the purchaser might have informed himself by due inquiry, if the conduct of the vendor and the general tenor of the transaction were such as to throw the purchaser off his guard,—or if the purchaser have stated distinctly to the vendor that he will trust to his representation of the property. Thus, in *Lysney v. Selby*, (p) which was an action by a purchaser against the vendor for fraudulently representing that certain houses were then demised at the yearly rent of £68, they being, in fact, let at the yearly rent of £52 10s. only, by means whereof the purchaser had been induced to give a much larger price for them, than he would otherwise have done; on motion, in arrest of judgment, after verdict for the plaintiff, it was laid down by Lord Holt, that "if the vendor gives in a particular of the rents, and the purchaser says he will trust him, and inquire no farther, but rely upon his particular, then, if the particular be false, an action will lie."

Where the whole matter passes in parol, all that is said may sometimes be taken together, as forming parcel of the contract; though not always, because matter, talked of at the commencement of a bargain, *may be excluded by the language used at the termination. [*137] If the contract be in the end reduced into writing, nothing which is not found in writing can be considered as part of the contract.

(o) 4 Taunt. 785.

(p) 2 Lord Raym. 1118.

A matter antecedent to and *dehors* the writing, may, in some cases, be received in evidence, as showing the inducement to the contract; such as a representation of some particular quality or incident to the thing sold. But the buyer is not at liberty to show such a representation, unless he can show that the seller, by some fraud, prevented him from discovering a fault, which he, the seller, knew to exist.^(q) Where, however, such previous misrepresentation, as to the value or other collateral circumstance relative to the property, has been made, it is of course perfectly immaterial, that it is not ultimately embodied in the written contract. In *Dobell v. Stevens*,^(r) which arose on the sale of a public house, there was misrepresentation as to the amount of rent and the value of business done, which was the plaintiff's inducement to make the purchase: no notice of these misrepresentations was taken in the conveyance of the premises, or in a written memorandum of the bargain after it was made; and it seems to have been thought that this would make a difference, with respect to the purchaser's right to recover damages; but Abbot, C. J., held clearly otherwise, saying, "the representation was not of any matter *or quality pertaining to the thing sold, and therefore likely to be mentioned in the conveyance, but was altogether collateral to it."

The doctrine that a purchaser shall, in an action for damages, only recover his deposit and costs, is very clearly laid down by Sir W. Blackstone in *Flureau, v. Thornhill*,^(s) where this Learned Judge says "that these contracts are merely upon condition, frequently expressed, but *always implied*, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected." The nature of this rule, and the extent of it, are very plainly to be collected from the reason which is given for it: and seems to furnish a clear ground of distinction from a recent case, which does not appear to have given entire satisfaction. If the person in the possession of an estate in the ordinary way, by descent or purchase, and, believing himself to have a title, offers his estate for sale, and it turns out upon investigation that he has not a title, this seems to be rather his misfortune than his fault, and it would be a harsh administration of law which gave the purchaser damages for breach of contract when the plaintiff had not the power to fulfil it. But where a vendor, not being in the ownership according to the ordinary acceptance of that term, but merely entitled under a contract, undertakes to sell an estate, he undertakes to sell that which, in the estimation of a court of *law, is not his own,—the doctrine of ownership under a contract being merely equitable, —and, consequently, he is, in a sense, guilty of a fraud upon the purchaser, by representing himself as having a right to that which, in the contemplation of a court of law, belongs to another person. In such a case, the purchaser having been, as it were, deluded by the conduct of the vendor into a nugatory contract, it seems very reasonable that he should be made to pay in damages for the consequent inconvenience and disappointment he has imposed on the purchaser.

On these grounds the decision of the Court of King's Bench, in the late case of *Hopkins v. Grazebrooke*,^(t) will be very clear, though it has

(q) *Kain v. Old*, 2 Barn. & Cress. 434.

(s) 2 Sir W. Bl. 1078.

(r) 3 Barn. & Cress. 266.

(t) 6 Barn. & Cress. 31.

been treated by Sir Edward Sugden as "likely to tend to much litigation before the distinction which it introduces is thoroughly understood."^(u) There the vendor had contracted for the purchase of an estate, but before he had obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him; the Court of King's Bench held that a purchaser might, in an action on the agreement for sale, recover not only the expenses he had incurred, but also the damages he had sustained by not having the contract carried into effect. Lord Tenterden, with reference to Sir W. Blackstone's *dictum*, said, "upon the present occasion I will only *say, that if it is advanced as a general proposition [*140] that where a vendor cannot make a good title, the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it; if it were necessary to decide that point, I should desire to have time for consideration; but the circumstances of this case differ very materially from that in Sir W. Blackstone's Reports. There the vendor was the owner of the estate, and an objection having been made to the title he offered to convey the estate with such title as he had, or to return the purchase-money with interest. Here no such offer was or could be made. The defendant had unfortunately put up the estate to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer *some* title, and having entered into a contract to sell without even the shadow of a title, I think he must be responsible for the damage sustained by the breach of his contract."

The distinction between these two classes of cases seems to be very clear. Where a purchaser brings an action against a vendor to recover damages, such damages shall be measured by the deposit and his expenses, if the ground of the action be, that the vendor cannot complete because of inability to show a clear title; but if the vendor's breach of contract results from his own misconduct or undue precipitancy, as where, for instance, he had subsequently conveyed the estate to another person, as in *Daniels v. Davison*,^(v) *or where he has entered into a contract before he became at law the owner of the es- [*141] tate, there the purchaser shall recover not only his deposit and expenses, but also such damages as may compensate him for the loss he has sustained by not having his bargain completed.

The preceding observations had been written before attention was called to the late case of *Walker v. Moore*,^(w) which seems to accord entirely with what has been stated above, and will probably put an end to any doubt as to the circumstances under which a purchaser will be allowed to recover damages on the contract. In this case the plaintiff, having agreed for the purchase of certain farms and messuages in the county of Lincoln, after the delivery of the abstracts, which, on the face of them, showed a good title, but before they had been compared with the originals, re-sold part of the estate purchased at a considerable advance. On examining the original documents, they disclosed a defect of title as to one-twentieth undivided part of the whole estate, in

(u) *Vend. & Purch.* 8th ed. 223.

(v) 16 Ves. 249.

(w) 10 Barn. & Cross. 416.

consequence of which the sub-purchasers refused to complete: and the question was, whether the plaintiff was entitled to recover damages against the original vendor for the loss of the beneficial sub-contracts he had entered into, and in respect of his liability for damages to the sub-purchasers. In the course of the argument, Bailey, J., having asked [*142] the counsel for the plaintiff, "whether *he had any right to sell before he knew that he had got a good title?" "whether the plaintiff was entitled to recover more, than the damage done by the misrepresentation of the title in the abstract?" and "whether the loss of a good bargain could be considered such damage?" delivered his judgment as follows:—"The case of *Hopkins v. Grazebrooke* is very different from this. There the defendant had sold property as his own which was not so, and the court was of opinion, that the defendant being in fault by representing himself as the owner of the property, the plaintiff's right was not restrained to nominal damages, and there the principle on which the jury assessed the damages is not stated. Here the defendants undertook to make a good title, and they might honestly think, that they should be able to do so. It turned out that they could not, and consequently the contract was broken, and they were liable to an action. The plaintiff, however, must show that the damages, which he seeks to recover arose from the acts of the defendant, and not from his own haste. Now, looking at the course of the proceedings, it appears that an abstract was delivered in August, and the objections made to the title, as there set forth, were answered in September; but the abstract was not then examined with the deeds, and until that had been done the plaintiff was not justified in acting upon the title shown on the abstract. If it had been examined with the deeds, and found correct, the plaintiff might perhaps have been justified in acting on the faith of [*143] having the estate; *and if, after that time, he had made a sub-contract, I think he would have been entitled to recover the expenses attending it, if it failed in consequence of any defect in the title of his vendor. And further, if there were *mala fides* in the original vendor, (but not otherwise) I am not prepared to say, that the purchaser might not recover the profit, which would have arisen from the re-sale. But if premises for which a party has contracted, are by him offered for re-sale too soon, that is at his own peril, and the damage, if any, resulting from such offer, arises from his own premature act, and not from the fault of his vendor. Here I think the plaintiff was premature, and therefore cannot recover."

The opinion intimated here, that if the purchaser had compared the abstract with the original documents, previous to the re-sale, he might have been entitled to recover damages for the loss of the bargain, will, perhaps, on examination, hardly appear tenable. Mr. Justice Littledale observed, with respect to it, that he was not prepared to say, that if such examination had been made, the plaintiff could have recovered, adding, "it seems to me contrary to the policy of the law that a man should offer an estate for sale before he has obtained possession, and a conveyance."(x)

(x) Ibid. 422. The same opinion appears to have been thrown out more decidedly by this judge in the course of the argument, when he observed, "it is contrary to the policy of the law that a man should sell his estate before he has a title and possession." This seems to be the sound view of the question, and flows naturally from the policy which produced the stat-

*(2) Of Mistake.

[*144]

Where a contract is entered into under circumstances of clear mistake or surprise,^(y) it will not be enforced; except in cases where the mistake is such as does not materially affect the substance of the agreement, and there has been perfect good faith in the party seeking specific performance of it.

*Thus in a case where the estate was described as freehold, and consisting of one hundred and eighty-six acres, of which [*145] forty-five were by mistake described to be a compact farm, and the rest a park, it appearing after the sale, that about two acres in or near the centre of the park were not freehold but leasehold, and the lease having expired, were at the time of the sale held only from year to year. The purchaser, after a good deal of treaty for an exchange of these two acres, the success of which was defeated principally through his own conduct, and also after possession forcibly taken by him, at the time fixed by the particulars of sale, and pending the negotiation for an exchange, finally refused to complete, and a bill was filed by the vendor. Lord Thurlow, who seems to have formed no very favourable notion of the conduct of the purchaser, yet thought himself bound by the rule of the court to allow some compensation for these two acres, saying that he should direct the master to look into the contract, and if the master thought as he did, he would not allow more for these two acres, than if they "lay in the middle of a waste at the farthest end of the kingdom."^(z)

If one party think that he has purchased *bonâ fide* what the other party thought he had not sold, this is a ground to set aside the contract, in order that neither party may be damaged; as it would be *impossible to say that one shall be forced to give that price for part [*146] only, which he intended to give for the whole; or that the other shall be obliged to sell the whole for a consideration which he intended to be the price of part only.^(a) Upon this principle, perhaps, may be explained a case^(b) which has met with some disapprobation. The sale was of a remainder expectant on an estate tail, both parties under a mistake considering that the remainder had not been barred. In point of fact, a recovery had been suffered before the contract. The court, on the ground

ute of Maintenance (32 Hen. 8, c. 9.) which enacts "that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in *actual possession* of the land or of the reversion or remainder, on pain that both vendor and purchaser shall each forfeit the value of such land to the king and the prosecutor." In equity, however, the sub-contract has the same validity as the original contract. "It is extremely clear," observes Lord Eldon, in *Wood v. Griffith* (1 Swanst. 55,) "that an equitable interest under a contract of purchase may be the subject of sale. A person claiming under that contract, becomes, in equity, a trustee for the persons with whom he afterwards contracts; without entering into any covenants for that purpose, they are obliged to indemnify him from the consequences of all acts which he must execute for their benefit; and a court of equity not only allows, but actually compels him to permit them to use his name in all proceedings for obtaining the benefit of their contract. If I were to suffer this doctrine to be shaken by any reference to the law of champerty or maintenance, I should violate the established habits of this court, which has always given to parties entering into a sub-contract, the benefit which the vendors derived from the primary contract." See *Hitchins v. Lander*, Coop. 34.

(y) See *Stanley v. Robinson*, 1 Russ. & M. 527.

(z) *Calcraft v. Roebuck*, 1 Ves. jun. 221.

(a) *Calverley v. Williams*, 1 Ves. jun. 210.

(b) *Hitchcock v. Giddings*, 4 Price, 135.

of mistake, set it aside, releasing the purchaser from a bond which he had given for the purchase-money, and compelling the seller to repay the interest which he had received. The Chief Baron, in giving judgment, said:—"That if a person sells an estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase-money, that is certainly a fraud,(c) although both parties should be ignorant of it at the time. Suppose I sell an estate innocently, which, at the time, is [*147] actually swept away by a flood, without my knowledge *of the fact, am I to be allowed to receive £5,000 and interest, because the conveyance is executed, and a bond given for that sum as the purchase-money, when, in point of fact, I had not an inch of ground to sell?"

Both these propositions are probably open to observation. With respect to the bond, it is plainly immaterial to the merits of the question, whether the money have been actually paid or only secured. It has been said by a great authority, that "both these cases, when they arise, will deserve great consideration before they are decided in favour of the purchaser." Probably they may, but on the broad principle of natural justice, it seems reasonable, that in all cases of this kind, where a contract is entered into by parties who are equally ignorant of the fact that the vendor has nothing to sell, equity can only be fairly administered by setting aside the contract, and restoring both parties to the situation in which they were, previous to entering into it.

When a party having a right to an estate purchases it from another person, in ignorance of his own title, the vendor will be compelled to refund the purchase-money with interest from the time of filing the bill, although there may not appear to be any fraud. Thus in *Bingham v. Bingham*,(d) one John Bingham among other things devised an estate tail in certain lands to Daniel his eldest son and heir, limiting the reversion in fee to his own heirs. *Daniel left no issue, but de- [*148] vised the estate to the plaintiff in fee. The bill stated, that the latter being ignorant of the law, and persuaded by the defendant and his scrivener and conveyancer, that Daniel had no power to make such devise, and being also subjected to an action of ejectment, purchased the estate of the defendant for £80, and that it was conveyed to him by lease and release. The bill was to have this money repaid with interest. The defendant, by his answer, first of all insisted that Daniel had no power to make such devise; but if he had, he urged that the plaintiff should have "been better advised before he parted with his money, for that all purchases were at the peril of the purchaser." The decree was for the money with interest and costs.

In *Twining v. Morrice*,(e) an estate had been knocked down to a person at an under-value, under an erroneous impression among the bystanders and *bonâ fide* bidders, that he was a puffer; "by an inadvertent act," said Lord Kenyon, "Mr. Blake was in a situation that hurt the

(c) This clearly it cannot be: fraud implies an intention to deceive. There can be no fraud, therefore, where both vendor and vendee are equally ignorant. It is a mistake of the same kind, and differing only in degree from that of the case *bonâ fide* of a purchaser thinking he had bought what the vendor as clearly thought he had not sold.

(d) 1 Ves. sen. 126; and see *Mr. Belt's Supp.* 79. See *Morse v. Faulkner*, 3 Swanst. 429, n.

(e) 2 Bro. C. C. 326.

sale, and was put into that situation by Mr. Twining; it is, therefore, not such a case as I can decree specific performance. I will not set aside the contract, but will leave the plaintiff to his remedy at law."

In *Mason v. Armitage*, (f) another leading case of the same class, there was a reserved bidding, and that any body who should bid £40 above it, should have the estate, which was communicated to the company *upon a request made by them in consequence of an [*149] erroneous notion that the plaintiff was a puffer,—the reserved bidding was £9,000; Mason, who, previous to the sale, had given an intimation that he would not purchase, bid up to £8,000, and no farther bidding taking place, in consequence of the notion of his being a puffer, the auctioneer, after a considerable lapse, and pointedly adverting to the person appointed to make the reserved bidding, with the view of inducing him to do so, and saying, "is it with your free will and consent that the estate shall be knocked down at £8,000 to Mr. Mason?" and the person appointed to make the reserved bidding, making no motion whatsoever, under an expectation that he should be called on by name, the estate was accordingly knocked down to Mason. The auctioneer, immediately after the sale, signed a memorandum to the effect that Mason was the highest bidder, and that he had refused to receive the deposit money, and the purchaser's moiety of the auction-duty on the ground that "the owner nor his attorney being present, he did not think proper to receive the same." The vendor pleaded the statute, with an averment—that immediately after the estate being knocked down to Mason, he "revoked the auctioneer's authority," insisting, therefore, that the writing signed by the auctioneer was not a writing signed within the meaning of the statute. The material facts were supported by evidence, the result of which appears to have been, that there was no fraud in the transaction. The Lord Chancellor *(Erskine) said, "I admit there is nothing in this contract showing that any thing was fraudulently obtained [*150] by the plaintiff; and if he had been declared the purchaser, and had got into possession so that the defendant had been obliged to come into this court upon the head of fraud, there would not be sufficient ground to deprive the plaintiff of the benefit of his legal contract. But that is not the case. This plaintiff has got all the law can give him, and applies here desiring more; and the question is Whether, under all the circumstances, and upon the authorities and principles, this is a case for a specific performance? In this case I cannot say the plaintiff has acted so as to be an example, though his conduct does not come up to fraud, so that I could have dealt with it as such, if he had obtained possession? The result of the evidence is plain misapprehension and mistake, not an after-thought by the defendant, satisfied at the moment with the sum of £8,000. If, however, the plaintiff thinks he has a case which the statute will not meet, upon which I do not give any opinion, he is not injured by this decision. There is nothing to show that this land is of any peculiar value to him; as, if it was contiguous to his own estate, or purchased with a view to set up a manufacture. Therefore Lord Parker's observation as to stock is applicable; and as the plaintiff declared he did not intend to make this purchase, and he has obtained an advantage through a mistake, a court of equity will not give him any assistance in that."

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*(3) *Of Uncertainty.*

Where the terms of the contract cannot be clearly collected from the agreement, the court will not enforce it. It is not, of course, necessary, that the terms should be contained in it,—if they can be ascertained from any other sources, clearly referred to by the agreement,—or by means specifically appointed for the purpose, that is sufficient. But where these means fail, by leaving the terms in question finally uncertain, the court will not interfere. And therefore where the agreement was for the purchase of an estate, at a price to be fixed by two surveyors, one to be chosen by each party, and the surveyors by their award in writing, after stating the land as 73 acres, valued the property at a certain sum, with a declaration that if there should be any error in the above admeasurement, “an allowance at the rate of £42 for every acre; either less or more than the said admeasurement should be made out of, or in addition to, the said purchase-money, as the case may happen, if the mistake be in the allotment in Horse-Moor-Field, over the brook; and an allowance of the same nature, at the rate of £84 for every acre, if this mistake be in the other part of the estate on the house-side of the brook,”—without stating how much of the land lay on each side of the brook, and consequently there were no means of determining to what extent the £84 was to be allowed, or to what extent the £42 only was to be allowed. On the ground of this uncertainty Sir J. Leach considered the award not to be final and certain and allowed a general demurrer to the bill.(g)

(4) *Of Hardship.*

A bargain may be so hard and unreasonable that in the absence of all circumstances of fraud, the court will not enforce it.(h) In *Tilly v. Peers*,(i) Lord Chief Baron Eyre thus expresses himself:—“laying out of our consideration all circumstances of fraud, the court upon the mere consideration of its being so hard a bargain will not enforce it.” What is such a degree of hardship or unreasonableness as will induce the court to refuse its aid, is matter of discretion for the court, and must depend upon the circumstances of each particular case. It is no objection to the ground of the equity jurisdiction in this respect, that it is vague and uncertain; many other principles on which courts of equity habitually act are equally vague and uncertain. To adopt the language of Lord Eldon with reference to another principle,—“the rule is clear enough, but the application in each particular case must depend upon the discretion of the judge. It is like the case of fraud; the rule is that this court will set aside a bargain for fraud; but the court has never ventured to lay down a general proposition what shall constitute fraud.(k)

It is obviously impossible to state as a proposition, what shall be the degree of hardship or unreasonableness, which would induce it to refuse

(g) *Hopcraft v. Hickman*, 2 Sim. and Stu. 124.

(h) *Squire v. Baker*, cited 5 Ves. 549, from Lord Harcourt's MS. table.

(i) In the Court of Exchequer, 1791, stated by Sir S. Romilly, from his own note, 10 Ves. 301.

(k) *Mortlock v. Buller*, 10 Ves. 306.

to enforce the contract; but it has been said that, unless hardship arise to a degree of inconvenience and absurdity, so great that the court can judicially say, such could not be the meaning of the parties, it cannot influence the decision.^(l)

The late case of *Rhodes v. Cook*,^(m) would seem to be referrible to this head. There the defendant to the original bill, who was tenant for life of an estate, remainder to his children as he should appoint, remainder to his children in fee, mortgaged the estate to the plaintiff's testator, and gave a policy of assurance on his life, as a collateral security. Afterwards he obtained a further advance of £500, for which he gave his bond only; but an agreement was made at the same time between himself, his two daughters, (who were his only children) and the creditor, whereby it was agreed that the estate should be immediately sold; that the father should receive for his own use a clear moiety, and that the other should be equally divided between the two daughters. The father lived seven years after, and continued all *that time in possession of the estate, without taking any steps to carry the [*154] agreement into effect. A bill was then filed by the purchaser. Afterwards both the father and creditor having died, a supplemental bill was filed by the executor of the creditor against the daughters, and their father's executor, praying that the agreement might be carried into effect, the estate sold, and that a clear moiety of the produce of the estate, after satisfaction of the mortgage debt, might be deemed assets of the father. The bill was dismissed on the ground that the daughters having by the father's continuing in possession till his death been deprived of the advantage, which they were to have under the agreement, it would be unreasonable, now that they had been deprived of that benefit, to enforce the contract against them.

Where a person undertakes to do a thing, which he can himself do, or has the means of making others do, the court will compel him to do it, or procure it to be done, unless the circumstances of the case render this highly unreasonable;⁽ⁿ⁾ but where a party has unwittingly entered into a contract, which he cannot himself perform, nor legally compel others to perform, it seems the court will not make a decree against him. Thus in the late case of *Howell v. George*,^(o) the court refused to enforce specific performance of an agreement to sell an estate in fee, [*155] *by a person, who supposed he was absolute owner, when he was only tenant for life under a settlement, with a proviso empowering him to purchase "an estate in fee simple in possession, in some convenient place or places in England, of equal or better value, and to convey and assign the same upon the trusts of the settlement, in lieu of the settled estate which was then to become his own." The defendant, in fact, was only tenant for life in the right of his wife, with remainder to his son in tail. And there were two points—first, whether the defendant ought not to be compelled to procure his wife and son to join with him in making a good title to the plaintiff; or, if not, that he might, in the alternative, be decreed to exercise the power vested in him by the proviso, and make a settlement of other lands, in compliance with such proviso.

(l) Per Lord Eldon in *Prebble v. Boghurst*, 1 Swanst. 329.

(m) 2 Sim. and Stu. 488.

(o) 1 Madd. 1.

(n) *Costegan v. Hastler*, 2 Sch. and Lef. 166.

With respect to the former of these points, the court holding that he could not be compelled to procure his wife to join in the conveyance, there being no evidence that he had agreed that she should convey, nor of her consent so to do,—nor his son, none of the cases having gone so far as to say, that a father can be compelled to procure his son to join in a recovery:—with respect to the other alternative (namely) compelling the plaintiff to exercise his power under the proviso, the court, after pointing out the great difficulties which would arise in the exercise of such a jurisdiction, thought that this was an equity which ought not to be enforced,—and accordingly dismissed the bill, but without costs.

[*156]

*(5) *Of want of Mutuality.*

Courts of equity acting merely on equitable principles, will in general lend their aid only where the remedy is mutual.^(p) And on this principle, it has been decided, that an infant cannot sustain a suit for specific performance, it being clear that a specific performance could not be decreed against him.^(q) Specific performance has indeed been decreed in certain cases, where it may appear at first that the remedy was not mutual. Thus a party who has signed an agreement, is unable to enforce it against one who has not signed it, although the latter can enforce it against the former;^(r) but this class of cases has never been entirely approved, and rest on authority rather than principle; and so far as they can be supported on principle, resting on reasons peculiar and technical, such as that the Statute of Frauds only requires the agreement to be signed by the party to be charged; and that the plaintiff by filing his bill has made the remedy mutual.

If the matter were *res integra*, neither of these reasons would probably be allowed to prevail at the present day. Lord Redesdale adverting to this question in *Lawrenson v. Butler*,^(s) thus expresses himself:—He said that “courts of equity have decreed performance in cases where one party only was bound by the agreement. I believe it would be difficult to find a case where that has been done, particularly a late case. In the case of *Hatton v. Gray*,^(t) it was considered sufficient that the agreement should be signed by the party against whom the performance was sought, because such are the words of the Statute of Frauds: now such, certainly, is the import, that no agreement shall be in force, but when it is signed by the party to be charged; but the statute does not say that every agreement so signed shall be enforced; the statute is in the negative. To give it this construction, would, as I have heard it urged, make the statute really a statute *of frauds*; for it would enable any person who had procured another to sign an agreement, to make it depend on his own will and pleasure, whether it should be an agreement or not.”

Another instance of an apparent want of entire mutuality, is that of a husband seised, *jure uxoris*, contracting for the sale of his wife's estate; such an agreement could be clearly enforced against the purchaser at the

(p) *Lawrenson v. Butler*, 1 Sch. and Lef. 13; *Howell v. George*, 1 Madd. 1. *Armiger v. Clarke*, Bunb. 117.

(q) *Flight v. Bolland*, 4 Russ. 298.

(r) *Backhouse v. Crosby*, 3 Swanst. 434, n. See *Kenney v. Wexham*, 6 Madd. 355.

(s) 1 Sch. and Lef. 20.

(t) 2 Ch. Cas. 164.

suit of the husband and wife, but if the purchaser were to file a bill against the husband and wife for specific performance, and the husband were to swear in his answer that his wife would not consent, it seems to be now settled, that the court could not interfere. But in cases of this description there is a difficulty, arising out of the peculiar relationship of husband and wife, and the *incapability of a married woman [*158] binding herself by contract, which is perfectly known to the purchaser when he enters into such an agreement; and therefore, it may be not unreasonably contended, that the purchaser in such a contract waives his privilege of mutuality. And, therefore, if a man with the consent of his wife agree to sell her estate, and afterwards repent, there is an opportunity and means for producing a fraudulent and collusive defence, which without interfering with the legal relations of man and wife, cannot be effectually reached and defeated. Until the rights of the wife be bound by a fine, or some other equally effectual means, the law gives her a *locus penitentie*, and if the husband choose dishonestly to avail himself of a defence grounded upon this circumstance, the law permits him to do so, rather than withdraw its protection from his wife. The purchaser being aware of this when he enters into a contract to purchase the estate of a married woman, it may be not unreasonably thought that he has waived the benefit of mutuality, unless he takes some effectual means to bind the husband, which he may do by a variety of means, one of the simplest of which probably would be by taking from him a bond, in a sufficient penalty, to perform the agreement. On these grounds, therefore, it would seem that the case of husband and wife being parties to a contract for the sale of her estate, hardly constitutes an exception to the general principle, that want of mutuality is a bar to specific performance.

**(6) Of the Effect of Delay as a bar to Specific Performance.*

[*159]

In consequence of an erroneous report of *Gibson v. Pattison*,^(u) it was at one time thought, that in equity time was not of the essence of the contract, and that either party might come at any time for specific performance. This error was first rectified by Lord Loughborough, in *Lloyd v. Collett*.^(v) The extent of this error and the tenacity with which it was adhered to, is well illustrated in the case of *Gregson v. Riddle*.^(w) The agreement was for a particular day, with a proviso that in case the title should not be approved of in two months, the agreement was to be void and of no effect. There was an outstanding legal estate, which could not be got in by that time. A bill was filed for that purpose, and to have the legal estate conveyed. The defendant resisting, a reference was directed to see whether a good title could be made; Lord Loughborough expressed an opinion, that the terms of the agreement were complied with. The report was in favour of the title. The cause coming on before Lord Thurlow the performance was still resisted, and his Lordship said it had often been attempted to get rid of agreements upon this ground, but never with success. The utmost extent was

(u) 1 Atk. 12; and see Mr. Sanders' note.

(v) 4 Bro. C. C. 469; S. C. 4 Ves. 689, n.

(w) From a MS. note of Sir S. Romilly, 7 Ves. 268.

[*160] to hold it evidence of a waiver of the agreement; but it never *was held to make it void. Mr. Mansfield for the defendant said, the intention was clearly to make it void, and that it would be necessary to insert a clause that, notwithstanding the decision of the Court of Chancery, it should be void. Lord Thurlow said such clause might be inserted, and the parties would be just as forward as they were before.

The courts have, however, long since, returned to the common sense of the matter, and Lord Eldon has on various occasions, (x) taken credit to himself for having been the first to do so. But this does not seem to be quite correct, the first case of a bill being dismissed, on the ground of the vendor's delay, being *Lloyd v. Collett*, (y) which was a decision of his predecessor, Lord Loughborough. There the purchaser demanded his deposit on the day fixed for the completion of the contract, the vendor not having delivered his abstract before that time, and also neglecting to deliver it, until after an action was brought for the deposit; Lord Loughborough considered this conduct to be evidence of an abandonment of the contract by the vendor, and dismissed his bill.

[*161] *According to Lord Alvanley indeed, (z) Lord Kenyon was the first who set himself against the idea that had prevailed, that when an agreement was entered into, either party might come at any time.

It is now perfectly established, that a party cannot call upon a court of equity for a specific performance, unless he has shown himself ready, desirous, prompt, and eager. In order however, to constitute time of the essence of the contract, it must be shown that the terms of the contract made it so; and also that the conduct of the parties has not been such as to alter it in that point; for the benefit of the objection in respect of time may be waived, even although it was originally made essential. Whether therefore time were originally of the essence of the contract, and whether (if it were) it continued to be so, are questions depending on evidence, and to be determined therefore at the hearing of the cause. (a)

In deciding upon the question, whether time be, or be not, of the essence of the contract, it is often material to have regard to the subject matter of the contract; as if it be for the purchase of a house for residence, this is a circumstance *à priori* tending to show that the intention of the parties was, that the contract should be completed on the day named. (b) So when the subject matter, is in its very nature exposed to daily varia-

[*162] tion, time *must necessarily form a very material ingredient in the contract. And on this principle where the contract for sale was of "the possession, trade, and good-will of a public house, and of the stock and furniture at a valuation," and it was agreed that the possession should be delivered and the money paid on a given day the

(x) "Then as to time, Lord Thurlow has said, on occasions without number, that time is not of the essence of the contract, and that not even the agreement of the parties can make it so. I have deviated from that rule so far as to say, that time may in certain cases be of the essence of the contract." Per Lord Eldon in *Levy v. Lindo*, 3 Mer. 84; and see *Seton v. Slade*, 7 Ves. 288.

(y) 4 Bro. C. C. 469; but see *Harrington v. Wheeler*, 4 Ves. 690, n., for a very valuable note of the judgment of the Chancellor.

(z) In *Milward v. Earl Thanet*, Rolls, 24th March, 1801, reported 5 Ves. 720, n.

(a) *Levy v. Lindo*, 3 Mer. 84.

(b) *Ibid.*

court dismissed a bill for specific performance by the purchaser, although he was ready to have proceeded to complete the day after. (c) His decision appears to have rested on the fact, that the vendor, by remaining on the premises beyond the day, might have become tenant for the succeeding year, and have incurred fresh liabilities. The stock too would be continually varying; the house could not be shut up, as the value of a public house depends on its being kept regularly open, and therefore he might reasonably say that he would not be bound by the contract, after the time agreed on for its completion.

So in *Doloret v. Rothschild* (d) where the contract was to purchase a loan, which the Neapolitan government had authorized the defendant to grant, in consideration of a certain annual sum to be called Neapolitan Rentes, Sir J. Leach, V. C., said that "where a court of equity holds, that time is not of the essence of a contract, it proceeds upon the principle, that having regard to the nature of the subject, *time is immaterial to the value, and is urged only by way of pretence [*163] and evasion. But that principle can have no application to a case like the present, where, from the nature of the subject, the value is exposed to daily variation, and a contract which was disadvantageous to the plaintiff, on the 1st February, and would therefore be then declined by him, might be highly advantageous to him on the 2nd February.

In *Wright v. Howard*, (e) although the V. C. declined making any general declaration as to the distinction between land contracted for as mere property, and land contracted for with a view to commercial purposes, yet he refused to give the representatives of the vendor the chance of perfecting their title before the master, on the ground that this would be in effect to compel the defendant at the distance of fourteen years to return to a commercial speculation, which he was then obliged to abandon from the vendor's inability to perform his engagement.

Though time have been expressly made of the essence of the contract, yet the benefit of such an agreement may be waived either at law (*Carpenter v. Blandford*, 8 Barn. & Cres. 575,) or in equity. And as to time being made of the essence of the contract, see *Reynolds v. Nelson*, 6 Madd. 18; *Morse v. Merest*, Id. 26; *Watson v. Reid*, 1 Russ. & Mylne, 236. Thus, in *Hudson v. Bartram*, (f) which arose out of an agreement to grant a lease to the plaintiff, who was in the occupation of the premises; the agreement was dated the 24th March, 1818; the consideration was £900, of which £100 was to be paid down immediately, an acceptance to be given for £400 at three months, and for *another £400 at six months, when a lease was to be grant- [*164] ed to the plaintiff, provided the whole of the £900 was paid; if not then fully paid, the agreement was to "be void," and the plaintiff was to deliver up quiet possession of the premises on or before the 30th of September (which would be a few days after the second acceptance became payable,) and to forfeit and pay £150 for compensation for breach of the agreement, and for use and occupation in the mean time; in case the plaintiff should not so deliver up possession, then to forfeit and pay to the defendant £500 by way of liquidated damages.

The £100 was paid down, and the first acceptance duly honoured. A

(c) *Coslake v. Till*, 1 Russ. 376.

(e) 1 Sim. and Stu. 305.

(d) 1 Sim. & Stud. 590.

(f) 3 Madd. 440.

few days before the second became due the plaintiff was under the necessity of going to Germany, and in the hurry of his departure forgot to provide for the second bill; but on the 11th September (16 days before the bill became due) sent a letter from Berlin to the defendant, stating that it would be impossible for him to come to England in time to take up the bill, but that he would return to England in three weeks after it became due, and would take it up accordingly.

The plaintiff returned on the 21st October, 1818, and on that day wrote to the defendant, stating that he had just returned and would wait on him next morning and take up the bill: he waited upon him accordingly, but defendant was not at home; several other appointments afterwards took place, but none of them with effect, owing, as far as appears, [*165] to *the want of punctuality of the defendant. On the 24th, the plaintiff received a letter from the defendant's solicitor, to the effect that the plaintiff not having kept the agreement, was called upon to pay the penalty for breach of the agreement, to deliver up possession immediately, or in default that the further penalty of £500 would be enforced.

It appeared also that during the plaintiff's absence, and after the second bill became due, the ground-rent had become payable, and the defendant had accordingly left notice to that effect with the plaintiff, with directions for the plaintiff to pay it, and on the 27th October, 1818, it was accordingly paid by the plaintiff, with the privity and knowledge of the defendant, and according to his directions, and a receipt given to the plaintiff as for so much rent received of the defendant by the hands of the plaintiff. The defendant by his answer admitted these facts, except as to the directions.

The plaintiff filed his bill for specific performance, and the question was, whether time, which, by the agreement, was to be of the essence of the contract, had been waived.

On a motion to dissolve the injunction, which had been obtained for restraining the defendant at law, the Vice Chancellor said that, although it was long doubted whether time could be made of the essence of the contract, yet that point has been settled by Lord Eldon. Here, as at law, it may be of the essence of the contract. The defendant might [*166] have insisted that *the agreement was determined, but it is contended that he consented, as he might do, to waive his right.

It is not necessary for the purpose of continuing the injunction, that it should be clear that relief would be given at the hearing, it is sufficient that there is sufficient ground for supposing that relief may be given: and if so the court will not allow the possession to be changed in the mean time.

The letter from Berlin was received on the 28th; on the 30th possession was to be delivered.

The defendant should have demanded possession on the 30th, if he had intended to insist on the strict fulfilment of the contract.

Then he sends the letter of the Duke of Portland's agent to the plaintiff, was it consistent that the plaintiff should pay the rent, if the agreement was at an end? If the agreement continued, the plaintiff must have paid the rent. At that time, therefore, it is clear that the defendant treated this agreement as still subsisting.

The plaintiff calls upon the defendant immediately on his return from abroad, proposing to pay the outstanding bill; and the defendant did not then insist on the termination of the agreement.

His Honour, therefore, continued the injunction to the hearing on the terms of the plaintiff paying the money due on the unpaid bill into court within a week, and giving judgment in ejectment, so that if he should not succeed in the suit the defendant might immediately take out execution.

*In *Heaphy v. Hill*,^(g) the plaintiff on the 9th of September, 1819, agreed to grant a lease, and obtain the ground- [*167] landlord's permission for the defendant to build a coach-house and stable on the premises, and to complete certain alterations and improvements, and deliver possession on, or before, the 29th of that month. The alterations not being completed, or the permission obtained by the time agreed upon, the defendant, on the 8th of October, 1819, informed the plaintiff by letter, that if the alterations and improvements were not completed by the 14th of that month, he should give up all idea of taking the house, and look out for one elsewhere. Shortly after, the plaintiff informed the defendant that the lease was ready for his execution, and requested him to name a day for that purpose, but the latter refused to execute, till the agreement had been fulfilled on the plaintiff's part. Nothing more passed for nearly two years, when the plaintiff filed his bill for specific performance, which Sir J. Leach dismissed on the ground of the delay, the only reason assigned for such delay by the plaintiff, being, that his attorney had mislaid the papers relating to the transaction.

(7) *Of the Competency of the Parties.*

Supposing the contract to have been entered into by a competent party, and to be in its nature and circumstance unobjectionable, it is as much of course *in equity to decree a specific performance, [*168] as it is to give damages at law; but the court will not enforce specific performance of a contract against a person who is not *sui juris*, whether that arises from infancy, coverture, or lunacy, or who is otherwise legally incompetent to perform it.

Upon this principle, the court will not enforce an agreement at the suit of an infant,^(h) nor will it enforce such agreements against an infant, except in those cases in which he is merely a trustee for others.

It is no objection, therefore, to a specific performance of the contract, that the vendor dies before the completion of it, leaving an infant heir; for in such case his heir-at-law is a trustee for the purchaser, and it has long been established that specific performance would be decreed notwithstanding the infancy. Previous to the late act of the 1st Will. 4th, the purchaser must have been content with the equitable title to hold and enjoy, there being no means of getting a conveyance of the legal estate, till the infant attained his age, the courts having always held, under the old acts, that their provisions for getting in the legal estate from infant trustees, applied only to express and not constructive trustees, and consequently were not applicable to cases of this description, inasmuch as

(g) 2 Sim. & Stu. 29.

(h) *Flight v. Bolland*, 4 Russ. 299.

the heir-at-law of a vendor is only a constructive trustee for the purchaser; but now, by virtue of the provisions of that act⁽ⁱ⁾ "where the [*169] *vendor shall have departed this life, either having received the purchase-money or some part thereof, or not having received any part thereof, and a specific performance of the contract, either wholly or as far as the same remains to be executed, or as far as the same, by reason of the infancy, can be executed, shall have been decreed by the Court of Chancery, in the lifetime of such vendor, or after his death, and where one person shall have purchased an estate in the name of another, but there is no declaration of trust from him, and a decree of the said court either before or after his death shall have declared him to be a trustee for the real purchaser, then, the heir of such vendor or such nominal purchaser or his heir, in whom the premises shall be vested, shall be deemed to be a trustee for the purchaser within the meaning of this act."

Nor will the court enforce a contract against a man for the sale of his wife's property, if he swear in his answer that she will not consent.^(k) The acts of a married woman with respect to her estate are perfectly void; she has, as was said by Lord Alvanley,^(l) no disposing power, though she may have a disposing mind. An agreement signed by her with her husband, does not affect her estate, or give the other party a right to call upon her in a court of equity, to execute a conveyance, to bar her in case *she survive, and to bind her inheritance.^(m) [*170] And it seems there is no case, in which a husband and wife having a power of appointment by deed over the wife's estate, in which a paper not executed *modo et formâ*, pursuant to the power, has been held to take effect as an appointment. If such a paper be signed by a person competent to contract, and be for valuable consideration, but defective in form, there is in that case a remedy in equity, because there is a valid contract to stand upon. But with a married woman there can be no binding contract, and consequently the instrument is not good as an agreement, the only ground upon which the defective execution of a power is supported in equity. It has never been expressly decided, that such a defective power could not be supported on any other ground, though there can be little doubt, that whenever the question shall arise, it will be so decided.⁽ⁿ⁾

Neither will the court enforce specific performance against a married woman, although the contract was clearly made with reference to her separate estate. This was very lately decided by Sir J. Leach, M. R., in the case of *Chester v. Platt*.^(o) The bill was filed in that case by the vendor against Charlotte Platt, the purchaser, and her husband, and the trustees of her separate estate, to enforce the agreement. It appeared [*171] that the plaintiff, in 1828, being *seised of eight undivided ninth-parts of a messuage and lands, in the month of December in that year, contracted with Charlotte Platt, one of the defend-

(i) 1 Will. IV., c. 60, sect. 16.

(k) See *Emery v. Wase*, 8 Ves. 505; *Howell v. George*, 1 Madd. 1; and what is said in *Flight v. Bolland*, 4 Russ. 299.

(l) *Wright v. Rutter*, 2 Ves. jun. 676.

(m) *Martin v. Mitchell*, 2 Jac. & Walk. 426.

(n) *Ibid.*

(o) MS. Rolls sittings after Trin. Term 1831. Affirmed by Lord Brougham, on appeal, 27th March, 1832.

ants, the wife of James Platt, another defendant, but who was then, and at the time of the filing of the bill, living separate, and apart from her husband, and who had very considerable separate estate vested in the defendants, Maitland and Corbett, as trustees thereof, for her sole and separate use and benefit, to sell and convey to her, and the said Charlotte Platt contracted with the plaintiff to purchase of, and from him, the fee-simple, and inheritance of, and in the same eight undivided ninth-parts, at the price of £2500. The agreement was in writing, signed by the parties, and the purchaser was described as "Charlotte Platt, of Sewardstone, in the county of Essex, gentlewoman, being a *feme covert*, having a separate estate, at her own disposal." A deposit was made at the time of executing the agreement, and the residue of the purchase-money was to be paid, and the conveyance executed, on the 25th day of March, 1829. The plaintiff delivered up possession of the estate to a person who was a servant of Charlotte Platt. The bill charged, that the trustees were bound to apply a sufficient part of the property which they held in trust for her separate use, to enable Charlotte Platt to complete the contract; it also charged the exercise of acts of ownership upon Charlotte Platt, and that she had waived all objections to the title. An action was brought in the name of the defendant James Platt, to recover back the deposit money; but as to that, the bill *charged [*172] that the action was brought by the separate solicitor of Charlotte Platt, and without the privity of James Platt, who was abroad. The bill prayed a specific performance, and that her personal estate might be declared liable to make good the purchase-money. The defendant, Charlotte Platt, by her answer, denied that she had ever authorised any person to take possession, and that she had ever exercised acts of ownership; she insisted also that the title was defective. The defendants, Maitland and Corbett, by their answer, stated, that Charlotte Platt, being a married woman, they submitted to the judgment of the court whether she was competent to enter into any valid or binding contract, and whether she or the trustees were bound to perform it, or pay the purchase-money. The usual reference, as to the title, had been made, and the master had reported a good title to have been first made on the 13th August, 1830.

Sir J. Leach on the cause coming on for further directions, intimated his opinion, that a married woman was incapable of contracting, observing that a note, or bond, is considered as an appointment out of her separate estate, and ordered the cause to stand over as to this point. On its coming on at a subsequent day, for the plaintiff were cited, Grigby v. Cox, (p) Stewart v. Kirkwall, (q) and Frances v. Wigzell; (r) and on the other side the *dicta* in Martin v. Mitchell, (s) Field v. Sowle, (t) *were principally relied on, but Sir J. Leach held, [*173] "that such a contract could not be sustained; that where a woman has a separate estate, she may appoint it; but, in this case, she had executed no instrument to part with it. In Grigby v. Cox; the wife had power to appoint, and had actually made an appointment: in that case she did not contract to appoint, but actually did appoint. That is perfectly consistent

(p) 1 Ves. Sen. 517.

(r) 1 Madd. 258.

(t) 4 Russ. 112.

(q) 3 Madd. 387.

(s) 3 Jac. & Walk. 413.

with all the authorities on the subject; but to hold that a married woman having only contracted to appoint shall be compelled to complete that contract by an actual appointment, is perfectly inconsistent with all the authorities; and the bill, therefore, must be dismissed, but not with costs, in consequence of the expense to which the plaintiffs had been needlessly put, in clearing the title in the master's office."

Neither will the court enforce a contract against a party, lunatic at the time of entering into it. But where the party is a lunatic with lucid intervals, and it can be shown that the contract was entered into in a lucid interval, it will be enforced. Thus where an agreement for the purchase of an advowson and estate was entered into with a person who afterwards, and before a conveyance was executed, was, under a commission, found a lunatic, with lucid intervals, from a period antecedent to the date of the contract; this was held to be no objection to a specific performance, provided it could be shown that the contract was entered into during the [*174] period of a lucid interval.(u) It would be necessary for this purpose to show, not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind, sufficient to enable the party soundly to judge of the act.(v) Lord Eldon, in expressing the result of Lord Thurlow's observations in the Attorney-General v. Parnter, represents him as saying, "that where lunacy has been once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had before, and that it should be proved by evidence as clear and satisfactory."(w) With respect, however, to questions of property, and, therefore, with respect to the class of questions here considered, his Lordship intimated his opinion, that the doctrine could not be carried quite so far; and that a man might be competent to deal with property, though his mind might not have recovered its former force and energy.

Where the party alleges a lucid interval, during which the contract was entered into, the question whether it were or were not so, is, it seems, [*175] the proper subject of an issue, it being an inquiry much more fit for examination *viva voce* before a jury than upon written depositions.(x)

Whether the defendant was incompetent from insanity at the date of the agreement "is," as has been justly observed,(y) "matter of fact. In support of that fact alleged, the inquisition is the proper evidence; but having been taken in the absence of the plaintiff it is not conclusive upon him. It is merely evidence *prima facie* of the lunacy, and it is competent for third parties to dispute the fact; and to maintain that, notwithstanding the inquisition, the object of it was of sound mind at any period of the time which it covers."

As a contract is not invalidated by a commission over-reaching the date of the contract, provided it can be shown that it was entered into in a lucid interval, *à fortiori* lunacy occurring after the date of the contract,

(u) Hall v. Warren, 9 Ves. 605.

(v) Attorney-General v. Parnter, 3 Bro. C. C. 443, where Lord Thurlow comments at great length and with great force on the degree of evidence which in a transaction of this kind would be sufficient to establish a sufficient competency of mind.

(w) *Ex parte Holyland*, 11 Ves. 11.

(x) Per Sir W. Grant, in Hall v. Warren, 9 Ves. 611.

(y) *Ibid.* 609.

can be no objection to it, for the plain reason, that the rights of the parties cannot be altered by the change induced by one of them afterwards becoming lunatic.(z)

Where a contract is enforced against a lunatic by a purchaser, it is plain that no conveyance of the estate can be had from him, and Lord Hardwicke,(a) seems to have thought that this circumstance might prevent the remedy in equity, and leave it at law; but Sir W. Grant advertising to this "question,(b) observes,—“it does not appear to me, that if the plaintiff is satisfied with that, which is in truth [*176] no title, but only an enjoyment under this court, he ought not to have all the court can give him. It is a disadvantage to him, of which the other cannot complain, that he cannot get a good title; but must rest an indefinite period without a title, having only the enjoyment.” His Honour therefore, appears clearly to have been of opinion, that the mere circumstance, that no conveyance could be had, was not an objection to enforcing the contract. In *ex parte Dykes*,(c) Lord Eldon declared, “that he could not make the title to the estate of a lunatic absolute, but only during lunacy.” It is unnecessary, however, further to consider these difficulties, it having been enacted by a recent statute(d)—“that when any person who shall have contracted to sell, mortgage, let, divide, exchange or otherwise dispose of any land, shall afterwards become lunatic, and a specific performance of such contract either wholly, or so far as the same shall remain to be performed, shall have been decreed by the Court of Chancery, either before, or after such lunacy, it shall be lawful for the committee of the estate of such lunatic, by the direction of the Lord Chancellor, intrusted as aforesaid, to be signified by an order to be made on the petition of the plaintiff, or any of the plaintiffs in such suit, to convey *such land in pursuance of such decree to such [*177] person, and in such manner as the said Lord Chancellor, intrusted as aforesaid, shall direct; and the purchase-money, or so much thereof, as remains unpaid, shall be paid to the committee of such lunatic.”

Where a tenant in tail enters into an agreement to sell, and dies before the entail is barred, specific performance will not be decreed against the next remainder-man in tail. Lord Hardwicke, in *Hinton v. Hinton*,(e) observes:—“it is truly said, that if a man seised of an estate tail, with or without a remainder over, contracts for sale, and receives the purchase-money and dies in the first case without levying a fine, or without a recovery in the last case, this court would not carry it into execution against the issue in tail; as was the case of Mr. Savil, of Medley, who, when tenant in tail, chose rather to live in gaol, and be served in plate there, than to perform his agreement; but the ground of that is, the issue in tail in the one case, or remainder-man in the other, claim *per formam doni* from the creator or author of the estate tail, and therefore though in the power of the tenant in tail to be barred by a particular conveyance, that not being done, the court cannot take away that right they derive, not from the tenant in tail, but from the author; that is a different ground.”

(z) *Owen v. Davies*, 1 Ves. sen. 82.

(a) *Ibid.*

(c) 8 Ves. 80.

(e) 2 Ves. sen. 634.

(b) *Hall v. Warren*, 9 Ves. 612.

(d) 1 W. 4th, c. 65, sect. 27.

[*178] It was at one time thought that a distinction *might be taken, between the case where the vendor was seised of a legal estate tail, and where only of an equitable estate tail; and that though in the former case the contract could not be enforced against the issue or remainder-man in tail, yet that it might in the latter, on the ground that equitable entails being mere creatures of the court and not within the Statute *de donis*, it was competent for the court to deal with them in such a manner as would best promote the ends of justice; but it being now settled, both as to freeholds and copyholds, that the same process is necessary to bar an equitable, as is required to bar a legal entail, a court of equity has no more power over the one than it has over the other, and consequently it is as little able to enforce specific performance in the one case as in the other.

(8) *Of the Effect of Inadequacy of Price.*

Where all the parties are competent to contract; and meet each other on equal terms, mere inadequacy of price constitutes no ground for resisting the performance of the contract, (f) it being the business *of the parties themselves to exercise due care and precaution in the negotiation of their own bargains, and no part of the business of a court either of law or equity, to rectify the consequences of individual negligence; *à fortiori*, therefore a contract is not to be set aside for mere inadequacy of consideration, (g) such a circumstance being of no more weight in equity than at law. (h) But though a man, who meets a purchaser on equal terms, negligently selling his estate at an undervalue, has no title to relief in equity, yet the court will inquire whether the parties did actually meet on equal terms, and if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress, it will avoid the contract. Accordingly in a recent case, where the vendor's tenant for life and remainder in tail, both [*180] in distress, joined in selling *the estate for an undervalue, although the court refused to interfere on the ground of its being the sale of a reversion (which it clearly was not, the union of the tenant for life and remainder-man rendering it, in fact the sale of an es-

(f) "Unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance," *per* Lord Eldon in *Coles v. Trecothick*, 9 Ves. 246. And Sir William Grant expresses himself in nearly as strong terms in *Western v. Russell*, 3 Ves. and Bea. 192, where he says: "It is alleged that the estate was sold greatly below its fair value; and upon that ground that there can be no specific performance. Here it is unnecessary to determine, as a general question, whether inadequacy of price might, or might not, be a ground for refusing performance, the case before the court being that of the proprietor of an estate not alleged to have been under any incapacity, or deficiency of judgment, or to have been led by accident, or design, into a misapprehension of the value. On one side we see a vendor setting his own price; obtaining it; living a year and a half after the completion of the bargain, and never expressing any dissatisfaction, but accusing the purchaser of delay: on the other here is the testimony of one farmer, who in April, 1814, looks over the estate, and says, that in his judgment, that estate must in 1809, have been worth nearly double the price. The court would treat men's contracts with great levity, if on such a state of circumstances it should refuse to carry them into execution." *Griffith v. Spratley*, 1 Cox, 383, a case where the circumstances were very strong, and the doctrines of equity on this subject were very fully considered; *Nichols v. Gould*, 2 Ves. sen. 422."

(g) *Per* Sir W. Grant, in *Gowland v. De Faria*, 17 Ves. 25.

(h) *Wood v. Abrey*, 3 Madd. 423.

tate in possession,) yet the purchase being made at an inadequate price, without the intervention of any other professional assistance than the vendor's attorney, and it being in evidence, that in this purchase, advantage was taken of the distress of the vendors, the conveyances were ordered to be set aside, upon the usual terms of redemption.(i)

The same doctrine was a good deal considered under a not dissimilar state of circumstances, in the recent case of *Molony v. L'Estrange*,(k) which is mentioned here, merely because it gives additional force to the proposition, that though inadequacy of consideration is not alone a ground for setting aside a contract, yet it is a circumstance which may, in conjunction with others, be entitled to great weight. There Sir Anthony Hart said, "It is not necessary to go into the abstract question of inadequacy of value on which judges have differed. I think it clear, that the price was inadequate at least to some extent; and I cannot disconnect the consideration of value from the fact, that the purchaser was the confidential attorney of the vendor."

To the general doctrine, as to the effect of inadequacy of price, the case of expectant heirs is an *exception, and it seems that in a court of equity all persons dealing with their reversionary [*181] interests, by way of sale or mortgage, are to be considered as such.(l) In the case of expectant heirs, dealing for their expectancies, the purchaser must show that he has given full value;(m) and if he fail in doing *so, the vendor is entitled to have the contract [*182] set aside on terms of redemption. The doctrine on this subject has undergone considerable changes. In the earlier cases, it was held necessary to show that undue advantage had been taken of the situation of such persons; but in more modern times it has been considered not only, that those who were dealing for their expectations, but those who were deal-

(i) *Wood v. Abrey*, 3 Madd. 417.

(k) 1 Beat. 406.

(l) 17 Ves. 23, 25 ; but see 2 Swanst. 140, n.

(m) *Gowland v. De Faria*, 17 Ves. 20. This decision was appealed from, but the suit was compromised by Gowland paying De Faria the costs, and a sum beyond what was decreed him at the Rolls.

The policy of the doctrines of equity, in respect to the bargains of expectant heirs, has been frequently and most justly condemned by equity judges, as it is obvious that these doctrines have no effect in preventing such bargains, although they tend materially to augment the hardness of them, it being necessary for the purchaser of reversionary interests, to take additional precautions, and to make the vendor pay for the contingency of the bargain being set aside. Notwithstanding this, instead of throwing in the whole weight of authority against a doctrine so pregnant with evil consequences, the courts have gone on, multiplying refinements, and branching out new distinctions in every direction. "I am aware," said Lord Eldon, "that during my whole time, considerable doubt has been entertained, whether that policy with regard to expectant heirs ought to have been adopted; and although Lord Thurlow repeatedly laid it down, that this court does shield heirs expectant, to the extent of declaring a bargain oppressive in their case, which would not be so in other cases, and imposes an obligation on the parties dealing with them to show that the bargain was fair, yet he seldom applied the doctrine, without complaining that he was deserting the principle itself, because the parties dealing with the heir expectant insured themselves against that practice, and therefore the heir made a worse bargain; but he certainly, like his predecessors, adhered to the doctrine, though not very ancient. It is not the duty of a judge in equity to vary rules, or to say that rules are not to be as fully settled here as in a court of law." *Davies v. The Duke of Marlborough*, 2 Swanst. 163. And in *Shelly v. Nash*, 3 Madd. 236, Sir J. Leach says, "the principle and policy of the rule may be both equally questionable. Sellers of reversions are not necessarily in the power of those with whom they contract, and are not necessarily exposed to imposition and hard terms; and persons who sell their expectations and reversions from the pressure of distress, are thrown by the rule into the hands of those, who are likely to take advantage of their situation, for no person can securely deal with them."

ing for vested reversions also, were so exposed to imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy to impose upon all who dealt with expectant heirs and reversioners, the *onus* of proving that they had paid a fair price, and otherwise to undo their bargains and compel a re-conveyance of the property purchased.

On this principle, as followed out and explained by the recent authorities, it may be considered, that whenever the mode of sale is such as to afford reasonable probability that a fair price would be obtained, the [*183] purchaser will not be put to show that he *has given an adequate consideration. A sale by public auction, fairly conducted, affords a very strong presumption that the full market value would be given, and in such a case, therefore, the general rule that the purchaser must show that full value was given, does not apply.(n)

Sales by public auction of reversionary interests, being supported, on the presumption that by such sale, conducted in the ordinary manner, and with the usual precautions, the fair market price will be ascertained, it follows, that if there be any thing in the circumstances or management of the sale which rebuts this presumption, the purchaser will then be thrown back on the general rule, requiring him to show that he gave full value. If, for example, the sale by auction be resorted to merely as an expedient to cover a private bargain, "it will operate nothing."(o) Equally unavailing will it be as a protection to the purchaser, if the vendor does not employ the precautions, which are usually resorted to for securing a sale at the full value; and therefore if it was announced in the particulars, that the estate would be sold without reserve, in such case it seems that the purchaser would be compelled to show that he had given the full value. Thus, in *Fox v. Wright*,(p) which was a suit to be re-

[*184] lieved from certain *post obit* bonds, Sir J. Leach, V. C., on a motion to dissolve *the injunction to restrain proceedings at law, said, "the true effect of the case of *Shelly v. Nash* is, that every purchaser at a sale by auction of a reversion is not necessarily bound to establish that he purchased at a full price; but that he purchased under circumstances which make it as equitable, that he should have the benefit of his bargain, as if he had bought not a reversion but an estate in possession. The question is, whether this present defendant purchased this *post obit* bond under such circumstances? The particulars of sale disclosed that the vendor was a young man about to raise £40,000 upon *post obit* bonds payable at the death of his father, and that the sale was to take place without reserve; that is, without any bidding on his part. Those who attended this auction necessarily, therefore, knew, that the vendor was a young man in distress; that he was so much pressed for money that he undertook with those who thought fit to be bidders, that he would not have recourse to those precautions by which every provident seller at an auction protects himself against an inadequate price. And I have to ask myself, in the language of *Shelly v. Nash*, whether it can be considered that such a vendor is not, in some sense, in the power of those who deal with him? and whether a sale by auction under such

(n) *Shelly v. Nash*, 3 Madd. 232.

(o) Per Sir T. Plumer, in *Shelly v. Nash*, 3 Madd. 236.

(p) 6 Madd. 111.

circumstances affords fair evidence of the market price?" His Honour was of opinion, that such a question was too important to be decided incidentally upon motion; and therefore continued the injunction to the hearing, upon the plaintiff bringing into court the *purchase-money with interest at 5 per cent., from the time of payment. [*185]

The principle then established by *Shelly v. Nash* is, not that a sale of a reversionary interest by public auction is necessarily valid, but that if such a sale be fairly and properly conducted, it affords a reasonable presumption that the value has been obtained, and consequently that the court will not interfere; a presumption, however, which the plaintiff may rebut by circumstances showing grounds for thinking that the full price was not obtained. Thus in *Hincksman v. Smith*,^(q) which was a cause and cross cause, and arose upon a bill for the specific performance of the purchase of an estate in fee, expectant on the death of a person 83 years of age, for £800; at the time of the agreement the vendor had just attained 21, and was induced to sell for the purpose of enabling him to fulfil an agreement for advancing a sum of money to a relation. It appeared upon the evidence of the solicitor who was employed by the plaintiff, and acted for both parties in drawing up the contract, that the defendant, at the time it was prepared, seemed to have little knowledge of the property, and especially that being asked by a solicitor as to the number of acres of which the estate consisted, he expressed his ignorance in that respect. Upon the representation of the plaintiff it was stated in the contract, that the land which was the subject of the sale, consisted of thirty-five acres or thereabouts, whereas upon a subsequent admeasurement, it was found to consist of forty-seven *acres. The [*186] plaintiff was the proprietor and occupier of land adjoining to the estate contracted for. It also appeared, upon the evidence of the plaintiff's own witnesses, that at the time of the contract the defendant's reversion was worth upwards of £1000, and the defendant's witnesses estimated it at a higher value. The Master of the Rolls, after adverting to the rule that the purchaser of a reversion must prove that he gave full price for it, said, "It may be observed, that, independently of this rule, there are objections to the plaintiff's bill for the specific performance of this contract. It is clear that the defendant, a young man, just of age, knew but little of this estate, and was altogether ignorant of the quantity of land; but the plaintiff being proprietor and occupier of land adjoining, it is difficult to presume that he was equally ignorant: yet it was upon the information of the plaintiff that the solicitor, who drew the agreement, inserted the quantity as containing thirty-five acres or thereabouts, and the defendant must have executed the contract under the impression, that such only was the quantity which he agreed to sell for £800, when in fact the actual quantity was forty-seven acres;" and accordingly his Honour dismissed the plaintiff's bill for specific performance and ordered the contract to be delivered up to be cancelled; but gave no costs on either side.^(r)

(q) 3 Russ. 433.

(r) See *Wood v. Abrey*, 3 Madd. 424; where the reason of this decision as to costs is shown.

[*187] *According to the decisions of courts of equity, years do not make much difference in the protection afforded to expectant heirs.^(s)

The cases on inadequacy, so far as the consideration of them belongs to this place, have turned most frequently on the grant of annuities, secured collaterally on reversionary interests in land. It will frequently happen that the grantor of the annuity, though dealing for his expectations, and being so far clothed with the character of an expectant heir, yet the annuity may be charged not only on estates in expectation, but also on estates in possession, and in such a state of circumstances the question naturally arises, how far the rule as to expectant heirs is applicable? Whenever the simple point shall call for decision, it will probably be made to turn upon the fact, whether the main object and the substantial part of the contract was the estate in possession, or that in reversion, and according as the latter may or may not be the fact, to apply the doctrine as to expectant heirs,—and in a doubtful case, as this is a doctrine objectionable in its policy and not approved of by the courts,—the ordinary rule that parties must stand by their contracts, however inadequate the price, would probably be allowed to prevail. With reference to this question Lord Eldon is reported to have said

[*188] “I should certainly hesitate long before *I laid it down as a principle, that if an heir apparent dealing substantially for his expectations, is dealing also for a present obligation, which it is hardly possible that he should discharge, or throwing in a present possession worth but a small proportion of the whole, he is not entitled to the protection given to heirs apparent dealing for their expectations. Such a proposition would lead to most enormous mischief, and go far to destroy the principle itself.”^(t)

It seems that a purchaser of an estate subject to an annuity charged upon it cannot set it aside, although it might be void as against the grantor, either on the ground of informality, or of its having been obtained fraudulently, or at an under price, connected with circumstances of distress in the grantor.^(u) But it seems that this rule is to be limited to cases as between vendor and vendee in the usual way, and that it does not apply to the case when the right springs out of a family settlement for family purposes.^(v)

On bargains of this kind, where there is on the one hand great inadequacy of price, and on the other circumstances of distress, but no evidence of fraud, other than what is to be inferred from a purchaser

[*189] *having got a cheap bargain from a man labouring under the pressure of pecuniary difficulties, important questions frequently arise as to the effect of equivocal acts of confirmation or great

(s) Per Lord Eldon in *Davis v. the Duke of Marlborough*, 2 Swanst. 143.

(t) *Davis v. the Duke of Marlborough*, 2 Swanst. 154.

(u) “I recollect to have been in a case in England (though the name has escaped me) in which a purchaser attempted to resist payment of an annuity, subject to which he had bought the estate, which was clearly void under the existing statutes relating to life annuities, but the court refused to entertain the objection.” Per Sir Anthony Hart, in *Molony v. L’Estrange*, 1 Beat. 413.

(v) *Ibid.*

and unexplained delay in seeking relief,—first how far these circumstances preclude the plaintiff from having relief, and secondly as to the extent of the relief which equity will grant,—questions, it is however to be observed, which can never arise where there is any evidence of direct fraud, in respect of acts or delay previous to the discovery of the fraud, since no time can be a bar to relief in a case of clear direct fraud, until it is found out, (*w*)

(*w*) In considering the effect of delay we are naturally led to the question, how far time operates as a bar to the relief, in cases where the contract was originally founded in fraud? the state of the law on this subject is sometimes expressed by the proposition that “trust and fraud are not within the statute.” This proposition is true in one sense,—in another it is not. In the case of express trusts, or of fraud undiscovered, time does not run; in the case of express trusts, the possession of the trustee is the possession of the *cestui que trust*, his acts are done on the behalf of the *cestui que trust*, and are for his benefit; and no dealing of his with the property can create an adverse possession upon which the statute of limitations can operate. This is not so with regard to constructive trusts, arising either out of the general principles of equity, by the natural relationship of the parties as in the case of guardian and infant—or so constituted by the decree of a court of equity, founded on fraud, or the other circumstances on which the court raises constructive trusts; there the possession becomes adverse, and the statute of limitations runs in the former case from the period at which the relationship of trustee and *cestui que trust* naturally terminates; and in the latter from the period at which the circumstances of the fraud were first discovered.

Thus in *Lockey v. Lockey*, (Prec. Ch. 518.) Lord Macclesfield “an able Judge both in law and equity, as ever sat on the bench” was clearly of opinion that where one receives the profits of an infant’s estate, and six years after his coming of age he brings a bill for an account, the statute of limitations is a bar to such suit, as it would be to an action for an account at common law.” So in *Hercy v. Dinwoody*, (4 Bro. C. C. 257,) where the trust was constituted by the decree of a court of equity, there having been in that case a decree to account; and, though after a decree to account it has been decided that the Statute of Limitations is not pleadable. (*Hollingshead’s Case*, 1 P. W. 742,) yet notwithstanding the court refused relief on the ground of delay.

The case was decided on the circumstances. The decree had been obtained in 1744; no effective steps were taken in prosecution of it from 1756 to 1790; during this interval both parties had slept on their rights, and the statute was not pleaded to the bill filed to carry into effect the decree. It was a case, therefore, peculiarly for the discretion of the court, and did not perhaps call upon it to proceed in analogy to the Statute of Limitations, or the presumptions made in similar cases at law. And accordingly Lord Alvanley decided it on grounds of public policy, rather than with reference to the Statute of Limitations, holding that he ought not to permit the account sought to be carried on, because the party who would otherwise have been entitled to it, had been guilty of such laches as to make it impossible to take the account fairly and justly.

What particular length of time would be a bar to relief under a decree to account, has not been decided, but it is probable that whenever a proper case arises, the court will hold that an interval of twenty years elapsing after any effective step has been taken in prosecution of the decree by, or on behalf of the parties interested, is a bar to the benefit of such decree, in analogy to the rule at law that a judgment debt shall be presumed to be satisfied after a lapse of twenty years, and no steps taken to keep the debt alive, and enforce its payment.

The principles which apply to constructive trusts as to the effect of time, apply equally to fraud, time being reckoned in the former case from the natural expiration of the trust; in the latter from the discovery of the fraud: for although it has been said on the authority of *Booth v. Lord Warrington*, (4 Bro. P. C. 163,) that length of time will not bar in case of fraud: yet such a conclusion is not to be drawn from a just view of that case. The only proposition which can be fairly grounded on that authority, is this, that as fraud is a secret thing and may remain undiscovered for a length of time, during such time the Statute of Limitations shall not operate, because until such discovery the title to avoid it does not completely arise. This is the true ground of the decision in the case of *Booth v. Warrington*, where the House of Lords held that the discovery of the fraud being alleged to be at a subsequent period, and arising out of circumstances collateral, and it being established that such was the fact, a court of equity was well warranted in avoiding the transaction, notwithstanding the Statute of

* Per Lord Redesdale, 2 Sch. and Lef. 632.

[*190] *Acts, to have the effect of confirmation, must be purely
 [*191] voluntary, and done with the intent to *ratify that which the
 party confirming is entitled to disaffirm. And therefore in
 [*192] *Molony v. L'Estrange*, (x) *where the annuity had been paid
 for many years and was never questioned till after the death
 of the grantor Colonel L'Estrange, when his son who took the estate on
 which the annuity had been secured under a family settlement, refused
 to pay it, Sir Anthony Hart held that this continued payment and ac-
 quiescence for so long a period was no confirmation, it being proved that
 Colonel L'Estrange, after he had granted the annuity, became dissatis-
 fied with it, and complained of it as a hard bargain, in which advantage
 had been taken of him, and that he withdrew his confidence from Mo-
 lony the grantee of the annuity, observing that it "was shown by this
 evidence, that he did not intend to confirm, but was ignorant of his
 power to resist. The successive payments therefore operated nothing
 in the way of confirmation."

When the transaction has been acquiesced in for many years, but is
 involved in obscurity, such as to furnish ground for belief that the plain-
 [*193] tiff was not *fully conuzant of his rights, the courts will
 consider such acquiescence merely as a lapse of time, and
 therefore in no way affecting his right to have it overhauled.

This is well illustrated in *Murray v. Palmer*. (y) In that case the
 estate in question (leasehold for lives, with covenant for perpetual re-
 newal) was settled by articles, dated 9th April, 1761, previous to the
 marriage of John Chawner with Anne Alt, on John for life, remainder
 to the issue of the intended marriage: part of the said lands were to be
 immediately given up to the said John, the residue upon the death of
 Robert, his father: there was issue of the marriage Robert and Eliza-
 beth. Upon the death of Robert the father, John under the articles en-
 tered into possession of all the settled lands, and continued thereon till
 1787, when being much embarrassed and involved in debt, a large ar-
 rear of rent being due, and an ejectment brought, he was obliged to go
 to service leaving his children utterly destitute, and subsisting by the
 charity of their friends. While thus circumstanced John Chawner un-

Limitations. In *Hovenden v. Lord Annesley*, (2 Sch. & Lef. 685,) a case in which the al-
 leged fraud was discovered so far back, that in 1785 a bill was filed, imputing the fraud, and
 impeaching the transaction on this ground, which was not followed up till 1794, a period of
 near sixty years after the first bill was filed. Lord Redesdale adverting to the notion, that
 time does not run against fraud, said "I hold it utterly impossible for the court to act in such
 a case. A court of equity is not to impeach a transaction on the ground of fraud, where the
 fact of the alleged fraud was within the knowledge of the party sixty years before. On the
 contrary, I think that the rule has been so laid down, that every new right of action that ac-
 crues to the party *whatever it may be*, must be acted upon at the utmost within twenty
 years."

The true principle seems to be that where there has been fraud, the statute does not run
 till the fraud has been discovered, afterwards it does; and therefore, in a bill, for example,
 impeaching accounts for fraud, it must be charged that the fraud was discovered within six
 years, for "if the fraud was known, and discovered above six years before exhibiting the bill,
 this, though a fraud, would be barred, by the Statute of Limitations." *South Sea Company*
v. Wymondsell, (3 P. W. 143.) On the same principle, if the object of the suit, was the
 recovery of land, or money secured or charged upon land, on the ground of fraud, the bill
 must charge that the fraud was discovered within twenty years, otherwise the remedy is
 gone. (See *Weston v. Cartwright*, Sel. Ca. Ch. 34; *Bicknell v. Gough*, 3 Atk. 538.)

(x) 1 Beat. 414.

(y) 2 Sch. & Lef. 474.

dertook to convey to the defendant, who had been a practising attorney, by an indenture of the 6th September, 1787, which recited that he was indebted in 312*l.* to defendant, and that as well to pay the same, as to provide a maintenance for himself and his family, he conveyed the said lands and all his interest therein to the defendant, and he warranted that he had good right to make the conveyance: but there was no covenant that the premises were free from incumbrances. By another deed of the 5th January, 1788, the defendant obtained *from Robert and Elizabeth, who were then in a helpless and distressed [*194] situation, in consideration of 300*l.* paid to Robert, and 200*l.* to Elizabeth, and of paying off certain debts mentioned in a schedule, a conveyance of all their estate and interest in the lands for ever: Elizabeth signed a receipt for the money; in fact, it was not paid, but a bond given her for the amount. No schedule was annexed to the deed as produced at the hearing, but it appeared that some paper had been annexed to it, which was torn off: on the 7th March, 1788, the defendant obtained from Robert Chawner a conveyance of the whole reversionary interest in the said lands, as if he were solely entitled to it, in consideration of the aforesaid sum of 300*l.*, and having got into possession, shortly after purchased the fee and inheritance. In 1792, Elizabeth married the plaintiff John Murray, and she, previously to the marriage, and her husband subsequently, received interest on the bond. In 1795 Robert died, leaving an infant son; in 1799 John died; and in July, 1800, a bill was filed by Murray and his wife against Palmer and the infant son of Robert, praying that the aforesaid deeds, so far as they affected the plaintiff's rights might be set aside, and for an account of the moiety of the rents since the death of John Chawner, and for what was due to Palmer on the footing of the 200*l.*, and interest, which the parties offered to pay. Palmer, by his answer, denied knowledge of the articles of 1761, insisting that the conveyance of 1787 was fair, and for full value; with respect to the deed of 5th January, 1788, that on R. Chawner applying to him to purchase his reversionary *interest, defendant, Palmer, advised him to advertise same, and consult his [*195] friends; that having done so, and being unable to find a purchaser, defendant agreed to give £500, which was the value, as ascertained by an eminent notary-public, which sum, in order to make a provision for the whole family, was, by Robert's desire, to be paid in the following manner, viz. £300 to Robert, and £200 to Elizabeth. As to the deed of 7th March, 1788, defendant was advised that if Elizabeth had not title to said lands, the former deed was informal; and, insisting on the whole, that there was no fraud or unfairness in the transaction, and submitting that, by receiving interest on the £200, and the length of time which plaintiffs had suffered to elapse, they must be taken to have confirmed the conveyance.

With respect to this last point, Lord Redesdale said, "The title of the plaintiff to relief would be clear, if her application had been recent. But two things are insisted on; first, that she having received the interest of this money while single, during two years and a half, and then she and her husband having received principal and interest during her marriage, these acts are to be taken as a confirmation of the transaction. Now I take it that nothing will amount to a confirmation of a fraudulent transaction but an act done by a party after he has become fully aware of the

fraud that has been practised. I do not mean to say that the party should be aware of all the circumstances of the transaction; but he must be aware [*196] that the act he is doing is to have the effect of confirming *an impeachable transaction: otherwise the act amounts to nothing as a confirmation. Then there is the acquiescence down to 1800, during the whole time that John Chawner lived. If the transaction had been one in which the interest of John Chawner himself had been involved, so that the interest of Palmer would be affected by this acquiescence, or his situation altered by it, it would be very important; but this is not the case, and therefore this acquiescence amounts to a mere lapse of time. I do not see that the plaintiffs had not the same means of gaining information before that, as they had at the time of filing their bill. Nothing is said of any new discovery, and the whole comes out on the view of the instruments, and the answer of Palmer. Probably, Murray, the husband, originally knew nothing of the case except the bond, and took that as his wife's fortune. With respect to her, she seems to have been as much in ignorance at the time of her marriage as ever, except that she understood that this was a very valuable purchase made by Palmer. It appears that Palmer, at the expiration of four years, let the estate to great advantage: this probably excited some conversation on the subject, and produced an investigation of the title, and when investigated it turns out to be founded on gross misrepresentation. Now the misrepresentation appears completely, only from the production of the deeds; and therefore, till that production, the case never fairly came, with all its circumstances, within the knowledge of the plaintiffs. One [*197] part of the case *which has struck me very much came out only on the production of the receipt for rent for £136, namely, that it bears date prior to the conveyance by John Chawner.

"Under these circumstances, I think the lapse of time very much excused by the obscurity of the transaction. It would have had a considerable effect, if the question had been with respect to a property for which Palmer had been called on to account during a long lapse of time; but he is not called on so to account, for, according to the claim of the plaintiffs, he is not accountable for the rents until the death of John Chawner, in February, 1799, and the bill was filed in July, 1800: so that he is not called on to account for much more than one year's rent. The delay, however, ought to protect him, to a certain extent; that is, as to what accrued from the death of the father, the account of rents ought not to be taken as against a person, who might not have evidence of his receipts and payments, in the same manner as if he had thought himself accountable; but, at the same time, not to make him wholly unaccountable."

Where, however, the vendor, with full knowledge of all the circumstances, and of his right to set aside the contract, confirms the purchase, equity will not relieve against the sale, although the aid of the court would not originally have been withheld. (z)

[*198] *Whatever effect time may have in precluding relief against a bargain of a remote period, it affords no ground for a court

(z) *Chesterfield v. Jansen*, 2 Ves. sen. 549; S. C. 1 Atk. 301. A note of this important case from MSS. in the possession of the writer of this Essay, will be found in the Appendix (A.)

of equity to enforce it, if shown to have been illegal originally. (a) When a party comes into a court of equity for assistance, the court looks into the whole transaction; and if there be reason to suppose that evidence may have been lost, or facts thrown into obscurity by lapse of time, great weight is given to the objections of delay; but where the lapse of time has worked no prejudice to either party by loss of evidence, then it is not an objection to which, in transactions of this kind, the court gives much allowance.

The court in awarding relief in a suit to set aside a contract executed, will have due regard to the conduct of the parties; and therefore, if the vendor apply in reasonable time, will not only set aside the contract, but direct accounts between the parties, and if the purchase-money and interest shall appear to have been overpaid will decree the surplus to be refunded: but when the vendor is under no disability, conuzant of all the facts, and acquiesces for a long period, the court will not direct accounts. Under *such circumstances to call on parties to refund by a [*199] retrospective decree to account, might ruin them, for a mistake encouraged by the *laches* of the vendor,—a course of rigour inconsistent with the temperate dispensation, which the justice of a court of equity administers.

There are cases in which the court will not interpose its assistance, but leaves each party to make what he can of his remedy at law. This will sometimes be done when there has been great delay; unless the dismissal of the bill will leave a great “reserve of litigation in other forms,” a circumstance, which a court of equity generally feels it to be its duty to prevent by a final decision, adjusting and settling the rights of all the parties. (b)

According to some recent decisions, it appears that the court will not interfere to set aside the sale of reversionary interests, when the reversion is dependent on contingencies, which in the opinion of the court do not admit of valuation. As if the reversion be dependent upon the death of a party dying without issue, such a contingency is considered to be incapable of valuation and consequently the rule as to reversionary interests cannot be applied. Thus in *Baker v. Bent*, (c) the property consisted of four-eleventh shares of a wharf and premises, and the reversion, which was the subject of sale, was expectant on the death of a [*200] bachelor *of the age of sixty-three years, without issue male; and was to be reduced to less than four-eleventh shares in the event of his leaving issue female, or of there being issue of his sister. The vendor at the time of the sale was in great distress. In March, 1817, a proposal on her behalf was made to the defendant, who after some correspondence agreed to give £550 for her interest, on the supposition that the reversion was to take effect absolutely on the death of the tenant for life. On the abstract being delivered the mistake as to the nature of the interest

(a) “I have found no case in which a bargain made in direct contra-vention of the policy of the court has been allowed to stand, merely because it had been submitted to for many years. There are many cases in which relief has been given after great lapse of time. The cases of *Beaumont v. Boulton* (5 Ves. 484; 7 Ves. 599;) *Randall v. Errington* (10 Ves. 423;) and *Wood v. Downes* (18 Ves. 120,) are marked instances of this kind.” Per Sir Anthony Hart, in *Molony v. L'Estrange*, 1 Beat. 414.

(b) *L'Estrange v. Molony*, per Sir A. Hart, 1 Beat. 414.

(c) 1 Russ. and Mylne, 224; and see *Nichols v. Gould*, 2 Ves. sen. 422.

was discovered, when the defendant stated that in consequence of the contingency, he should only give half of what he had before offered, and the contract was carried into effect on these terms. The reversion fell into possession in the year 1822, but the bill to set aside the sale was not filed till 1828. It was clearly established in evidence that the sale was at a great under-value, and that setting aside the contingency of issue of the tenant for life, or his sister, the reversion at the time of the sale was worth about £2,600. It was contended, on the behalf of the defendant, that the ordinary principle could not be applied to a case like this, because it was impossible to estimate the value of the contingency on which the reversion was expectant; the value of a reversion to take effect, on the death of a person of a given age, being a matter of calculation; but there was no arithmetic which could estimate the probability, whether a certain individual would marry or *not, and whether, [*201] if he married, he would have issue.(d) The court could not

(d) On a point like this, it is hardly worth while to hazard an observation; but if it were necessary, it does not appear difficult to show, that the opinion stated by the Master of the Rolls, and which had been so confidently relied on in argument without, as it seems, any contradiction by the counsel on the other side, is by no means so clear as it is here assumed to be. Whether such a contingency does or does not admit of exact computation, may perhaps admit of doubt; but at all events, the reason given by his Honour, "that it depends upon the peculiar habits and dispositions of the party, and the accidents of life," is no satisfactory proof of the negative; since the same reason would show that the reversionary interest in a life estate was not capable of computation, inasmuch as the duration, of the existing life of a given individual, must manifestly depend "on his peculiar habits and disposition, and the accidents of life," (that is to say) on his temperance, his constitutional tendencies to disease, and upon the chance of his escaping the accidents, which at any moment may put a termination to his existence. A bachelor of sixty years, may suddenly marry and disappoint all ordinary calculation; so, on the other hand, a man in the prime of life and in the vigour of health, may be suddenly cut off by the effect of internal diseases which had previously been imperceptible, or by the occurrence of sudden and unforeseen accidents. But to argue, therefore, that the probable duration of such a life could not be numerically valued, would be to lay aside the first principles of chances, and to forget the very nature of such calculations. The principle of calculation has no application to individual cases; it contemplates only the general average of society at large.

The Master of the Rolls would probably have been nearer the truth, if he had stated that, in the case of reversions dependant on a life, there were existing tables and facilities, for ascertaining the value of such interests; but that, as to contingencies dependant on the death of a party dying without issue, no such tables and facilities existed, and consequently in the former case, the value of the reversion was capable of being ascertained with that degree of readiness and certainty which the courts would act upon; but that the latter presented difficulties, with which the court did not feel itself bound to grapple, for the purpose of supporting or extending a doctrine of which it disapproved.

With regard to the contingency, which has given rise to the preceding observations, it might be valued exactly on the same principles as are employed in the ordinary case of life annuities; and it would not be difficult, if this were the proper place for such speculations, to exhibit a formula expressing the value of this contingency.

It would not have appeared necessary to go into so much observation on a topic which is purely a matter of science, had there not been shown, by other judges and in other cases, a disposition to exclude contingencies of this kind from the pale of legal protection, in such a way as clearly to work great injustice. The class of cases here alluded to are cases in bankruptcy, in which claims resting on the strongest considerations of equity have been refused to be admitted to proof on some vague notion that they did not admit of numerical valuation.

Thus, in a case of *ex parte* Eagle, (1 Mont. and M'Arthur, 422) Lord Lyndhurst seems to have acted on a similar assumption as to the impossibility of such valuations, and that this circumstance formed a ground for refusing the assistance of the Court. The question in that case arose upon a marriage settlement, in which (so far as it is material to be here stated,) W. Smith, the intended husband, covenanted "that his heirs, executors, and administrators should, within twelve months after his decease, pay to the trustees of the settlement the sum of 4,000*l.* upon trust, to pay the interest to his intended wife for life if she should

set a value on such a *contingency, and therefore it could not interfere with the transaction, on the ground that the full [*202]
 *value was not paid; and on this ground the Master of the [*203]
 Rolls would, it appears, have dismissed the bill; but the

survive him, and after her decease to transfer the principal unto the children of the marriage in manner therein mentioned; and if there were no children of the marriage, to pay the same unto the survivor of them, his or her executors, administrators, and assigns, for his and their own proper use and benefit. On a petition by the trustees to prove for the value of this sum of 4,000*l.* as a contingent debt, Lord Lyndhurst, reversing the judgment of Sir L. Shadwell, said: "It is unnecessary for me to express any opinion upon the arguments urged at the bar, as to the distinction between covenant and debt, because my judgment is founded on a consideration, that in this case the contingencies are incapable of valuation by the commissioners. They would be bound to ascertain the sum to be proved by a correct estimate of all the different contingencies; but as they are not capable of valuation, I think the claim does not fall within the relief intended by the clause of the statute applicable to contingent debts."

This it will be admitted at once is a case of great hardship, inasmuch as the effect of it is to deprive the wife and children of the bankrupt of the benefit of a provision made for them previous to the marriage of their parents,—a species of provision, which, on the soundest principles of policy has always been vigilantly guarded by our courts of equity. It is not an idle inquiry, therefore, to ask, what was the amount of difficulty which impeded the current of justice? The money in question was to be paid to the trustees for the benefit of children, and if there were no children, then to the survivor of the husband and wife, his or her executors, administrators, and assigns. Hence, if there were no children and the husband survived his wife, the money would be payable to the husband, his executors, administrators, or assigns; and would, therefore, in this contingency belong to the assignees. In order to entitle the assignees, there must be—1st, no children; 2nd, the husband must survive the wife; and the valuation of the contingencies is therefore reduced to the ascertaining the probability of these events happening concurrently, a question which, it is apprehended, any actuary of competent knowledge would, when furnished with the requisite degree of information as to the ages of the parties, &c., very easily determine.

In a case of this description extreme accuracy is by no means essential. In bankruptcy the struggle is for the wreck, and the title of the wife and children to a fragment of it rests surely upon as strong a foundation as any other claim.

It would in all cases be easy, on general principles, to form a rough estimate of the value of the contingency, an estimate, however, sufficiently exact for practical purposes. Take, for instance, the case decided by Lord Lyndhurst. There were three contingencies: 1st, the existence of children; 2d, there being no children, and the wife surviving her husband; 3d, there being no children, and the husband surviving his wife. If either of the first two events happened, the claim in question was a debt upon the husband's estate,—if the last happened, it sunk into it, and consequently passed to his assignees. The first of these events is the most probable, the two last, in ordinary cases, of nearly equal value. It is clear that by reckoning these three events as of equal probability, complete justice is not done to the claim of the wife and children, and consequently to such an assumption of their relative values no objection could be taken on behalf of the assignees. On this hypothesis, the value of the interest of the wife and children to that of the husband would be as two to one, and, consequently, the value of their claim would be two-thirds of 4,000*l.*: and to have avoided all cavil, the interest might have been taken of 2,500*l.*, which is clearly below its true amount.

Considerations of this simple kind would be applicable to the valuation of almost all contingencies which could arise in cases of this description: and even if the mode of getting at a rough estimate of the contingency were not quite so obvious, it seems to be the duty of the court, in favour of those claims which are recognized as being among the strongest and most sacred, to struggle against all difficulties of an ordinary character.

In *ex parte Davis in re Wentworth* (1 Mont. Ca. Bank. 121,) the bankrupt, in consideration of the marriage of his son James Rishworth with E. H., covenanted "that from and after the marriage the said J. R., should, during his life or until he became bankrupt, receive an annuity of 100*l.* a year, charged on certain lands, and on such event, then to be paid to his wife E. H., to her separate use, and from and after his decease, so long as she should continue his widow unmarried; and upon further trust in case there should be one or more children of such marriage, then that the trustees should after the decease of or next marriage, which should first happen, of the said E. H., in case she should survive the said J. R., by mortgage or sale of such lands, raise the sum of 2,000*l.* to be paid unto any one or more of such children:" there was also a covenant by the bankrupt, his heirs, executors, and admin-

- [*204] *defendant having himself set a value on the contingency, by proposing to deduct one-half the sum he had offered for the reversion when *he considered it to be absolutely expectant
- [*205] on the death of the tenant for life, His Honour was of
- [*206] *opinion that the defendant could not complain that the court adopted the rule which governed his own conduct in

istrators, for the due payment of the said annuity of 100*l.*, and of the said sum of 2,000*l.*, or so much thereof, as should not be raised by sale or mortgage as aforesaid. The lands being insufficient to secure the annuity and the sum of 2,000*l.*, the question, on a petition by the trustees of the settlement, was, Whether they could prove for the difference!—that depending upon the ulterior question, Whether the annuity and the 2,000*l.* were capable of valuation? Sir L. Shadwell, after observing that the contingencies in *ex parte Tindal* were very similar to this, and that “if he was at liberty to decide unfettered, he should give his opinion otherwise,” dismissed the petition but without costs. From this decision there was an appeal to the Lord Chancellor, when, in consequence of the conflict of opinion between Sir L. Shadwell and Lord Lyndhurst, and for the purpose of settling the question speedily and without expense to the parties, Lord Brougham called in to his assistance, Lord Chief Justice Tindal and Mr. Justice Littleale; the opinion of two actuaries was taken, who thought the contingency could not be valued; and the order of the Vice Chancellor was confirmed.

That the contingency could not be *accurately* computed for the want of *data* is perfectly obvious,—but that it could be *approximately* computed, and that this is all which the statute could require, it will not be very difficult to show. It is obvious that during the husband's life the annuity was payable, at all events, either to himself or his wife, as the question about the widow's marrying again could not arise during that period. Now for the husband's life, the annuity was valued by the actuaries at 1,750*l.* in round numbers, and its value during the wife's survivorship, at 320*l.*; if she married again this latter sum would have to be diminished in proportion; but to avoid any question, this sum might have been rejected altogether, and then a sum of 1,750*l.* would have remained, to which, at all events, the petitioners were entitled to proof, in respect of the annuity. Then as to the 2,000*l.*, this sum was to be paid only “in case there should be one or more children of such marriage.” If at the time of the bankruptcy there were children of the marriage, which does not appear by the Report, the contingency was gone, and the gift had become absolute. As no children are mentioned it is to be presumed there were none; but as at the time of the bankruptcy, the husband was only twenty-seven, and his wife twenty-three years of age, the probability that they would have children was at least as great as the probability that they would not have any; according to every principle of calculation, the chances of their having children therefore could not be estimated at lower than one-half: it ought to be reckoned much higher. This would give in respect of the 2,000*l.*, a further sum of 1,000*l.*, as to which, it is perfectly clear that the petitioners were entitled to prove. The result of the preceding observations will be that the petitioners were demonstrably entitled to prove for a sum of, at the very least, 2,750*l.*

It is submitted, notwithstanding Lord Chief Justice Tindal and Mr. Justice Littleale “expressed their clear opinion that the case was not within the statute, which contemplated the proof only of such contingencies as are capable of valuation, which this was not,” that the framers of the statute, in forming the section of the Bankrupt Act, out of which these questions arise, could only have contemplated contingencies of this kind; for it was to the hardship of this class of cases, towards which the remarks of preceding judges had always been directed, and in consequence of which this very section was framed. (See *Tully v. Sparkes*, 2 Lord Raym. 1546; *ex parte Caswell*, 2 P. W. 497; *ex parte Greenaway*, 1 Atk. 113; *ex parte Greome*, and *ex parte Winchester*, 1 Atk. 115; *ex parte Mitchell*, 1 Atk. 120; *ex parte Barker*, 9 Ves. 110; *ex parte Alcock*, 1 Ves. & Bea. 176; *ex parte Taaffe*, 1 Glyn. & Jam. 110.) It must also be presumed that the legislature was fully aware of the fact, that such contingencies were incapable of exact and rigorous valuation; and therefore, we must conclude, that when they spoke of valuing such contingencies, they intended approximate valuation,—or, in other words, the valuation of so much as could with ordinary *data*, and upon ordinary and familiar principles, be clearly ascertained—meaning of course to reject all such parts of the contingency as might lead to intricate and curious speculation, beyond the reach of ordinary means of computation.

It is therefore, submitted, that the Vice Chancellor's reluctance to decide this question against the right of proof was well-founded; and that his judgment and the confirmation of it on appeal are untenable.

*the treaty; and accordingly thought the justice of the case would be reached by a reference *to the master, to enquire and state what was the value of four-elevenths of the reversion at the time *of the agreement, supposing it had been to take effect certainly at the death of the tenant for life, and by declaring that one-half of such value was to be deducted in respect to the contingency. [*207] [*208] [*209]

Two cases may be here noticed, which would more properly have been stated in an earlier part of this section.

In *Ryle v. Swindells*,^(e) by articles, dated the 6th July, 1809, the defendant, a publican, in consideration of £30 paid down, and of £770 to be paid in manner thereafter mentioned, agreed on or before the 6th of August then next to convey to plaintiff in fee eight-twelfth undivided shares of a certain messuage and premises, subject to his father's life-estate therein; £570 only was paid at the time of executing the conveyance, £200 being by the agreement retained by the plaintiff, in order that if he should at any time purchase the remaining shares, any excess above £100 a piece, which he might be obliged to give for them, he might reimburse himself out of this money, and pay the residue *to defendants, interest on the whole being to be [*210]

Since these observations were written the case of *ex parte Tindal*, on the authority of which the Vice Chancellor gave his reluctant judgment, in *ex parte Davis*, has been reversed on appeal; the case has not yet been reported, but the author has been favoured with a short note of the judgment, pronounced by Lord Chief Justice Tindal,—which so far as it bears upon this point is as follows:—

"Then if this were taken to be a debt contracted by the bankrupt, there was no doubt that it was a debt payable on a contingency. The contingencies were, first, the death of the bankrupt; and, secondly, the event of there being no children, in case the wife were already dead. The nature of these contingencies, however, formed no reason why the debt should not be proveable; nor could it be maintained that it was excluded either by the words or the spirit of the statute. It was no reason against admitting a debt that the contingency on which it was payable might never happen, and therefore that it would never have to be paid. There had been many cases from a very early period down to the passing the act of the 6th Geo. 4th in which the hardship of not admitting the proof of contingent debts had been severely felt by the judges who were called upon to administer the law as it then stood. No doubt the legislature had those objects in view when the Act was framed, and his Lordship was of opinion that the words of that Act included this and the class of cases under which it was to be ranged. The main argument, however, relied on against the proof was, that no valuation could be made of this debt. It was said to be uncertain if any of the persons now in existence, and apparently entitled, would be in existence at the period of the bankrupt's death, and that others might come into existence before the same period. But although this was true, it was no reason why the valuation could not now be made. The valuation would be simply, what is the present worth 4,000*l.*, payable after the death of an individual of such an age as the bankrupt had attained? If the debt were payable immediately the trustees would be at liberty to prove for the whole amount of the debt; if at a future day they would prove for the same amount with a rebate of interest up to the time of payment. The proof must therefore be for the value of the whole debt. If the proof were for the benefit of the husband, that would be nugatory; because it would immediately revert to his assignees; if he should survive both his wife and children he would become entitled; but his contingent interest passed under his commission, so that might be provided against. Upon the principles which his Lordship had thus laid down, he thought the trustees of the settlement should be allowed to prove."

"There are cases," said Lord Eldon (speaking of one which he described as being "as difficult a case as any in equity,") "in which the court gives more than may be actually due on account of its inability to distinguish." (*Adley v. The Whitstable Comp.* 1 Mer. 111.) If more may be given than is actually due, surely, on the same reasoning, less may be given than the parties have a just right to claim, if their claims could be rigorously ascertained by the ordinary means of calculation.

(e) 1 McClel. 519.

paid him in the mean time. The father died in May, 1814. The suit was originally commenced in 1810; but owing to deaths and other causes, was not brought to a hearing until July, 1824. An attempt was made to impeach the fairness of the transaction, but the evidence broke down on this ground, and the case resolved itself ultimately into a mere question of adequacy. The plaintiff's witnesses, who were farmers or otherwise similarly situated in life to the defendant, estimated the value of the reversion of the *whole* of the estate at from £1,200 to £1,430, calculating the father's life-interest to be worth from nine or ten to fifteen years' purchase, at £89 or £90 a-year, and making a further deduction in computing the value of the defendant's portion on account of the manner in which it was circumstanced. The substance of the defendant's evidence was, that at the time of the contract the father's age was seventy or seventy-two, and his life a very bad one, owing to his indigence and wretched mode of living, being frequently destitute of the necessities of life; that the defendant was extremely poor, uneducated, and illiterate; of a very weak understanding, and subject, throughout the year 1809, to habitual and almost constant intoxication: that in 1809, the annual value of the entire premises was £140, or at the lowest £120; the father's life-interest worth only four or five years' purchase, and the son's reversionary interest, worth at the lowest £1,500. The Lord *Chief

[*211] Baron, after disposing of that part of the case which alleged fraud and unfairness, proceeded thus: "but with respect to inadequacy, there seems that degree of it which, according to the authority of the cases, should prevent a specific performance. Taking it upon the representation of his own witnesses, I consider this to have been much too favourable a bargain for the plaintiff. One of them estimates the father's life-interest at from ten to fifteen years' purchase, and there is not one that does not speak of it as being worth nine years' purchase, whereas I am sure it could not have been of the value of more than six. It was thrown upon the plaintiff to make out a case of adequacy, in order to entitle himself to a decree, and he has not done it in the way he ought; it was incumbent on him to have a valuation of the property made by a competent valuer, and an actuary should have stated what would have been a fair consideration for the reversionary interest, upon a view of all the circumstances. The general condition of this man, which was represented to have been that of extreme indigence, ignorance, imbecility of intellect, and habitual inebriety, was such as should render him an object of the protection of the court. I think no man capable of dealing prudently with his own interests could have acceded to that stipulation in particular relative to the £200, by which in fact it depended upon the conduct of the vendee of the estate whether he should ever receive more of the residue of the purchase-money or not. I must therefore *dis-

[*212] miss the bill, but I shall make no disposition as to costs."

In the subsequent case of *Headen v. Rosher*, (f) the same Judge refused to set aside the contract, although the valuation of Mr. Morgan, the actuary, was £928 8s., and the price given only £630,—rather more than two-thirds of the calculated price, which it appeared, however, on the evidence, was about the utmost that could be commonly got upon the sale of reversionary interests. This judgment is, however, more im-

portant for its collateral observations than for the point directly decided. With respect to the proposition laid down by Sir W. Grant in *Gowland v. De Faria*, the learned Chief Baron is reported to have expressed himself as follows:—"Notwithstanding the very great respect which I entertain for the great judge who determined it, I cannot bring myself to adopt the principle which he is reported to have laid down there. He is made to say, that when he examined *Peacock v. Evans* he found the doctrine of the court perfectly established, that the validity of contracts of this nature turned almost exclusively upon this circumstance of the adequacy of price. He seems to have considered that such guards are thrown about a person about to dispose of a reversionary interest, that he can hardly dispose of it but by public sale. I cannot say that; and however closely that case approaches to this, it may *be observed [*213] in answer to it, that the decision was appealed from, and the suit was eventually compromised. Neither the other cases cited, nor the current of authorities warrant, in my judgment, the position in the latitude, in which it is laid down in *Gowland v. Faria*."(g)

From the preceding survey of the cases and *dicta* on the subject, it must be sufficiently obvious that the law has at length arrived at that degree of confusion, in which it seems impossible much longer to postpone legislative interposition. The judges have struggled so hard to get out of the operation of the doctrine in particular cases, and have drawn so many curious distinctions as to render it impossible to advise satisfactorily on questions of this kind.

The late case of *Lord Portmore v. Taylor*(h) will throw considerable light on the observations contained in the preceding pages. The facts, as they appeared from the pleadings and evidence, were as follows:—In the year 1808 the present Lord Portmore, then Lord Milsington, was entitled to an interest in possession of £1,499 a year, and an interest in reversion of £1,154; but this interest was encumbered with annuities which he had granted for his own life, to the amount of £1,400; so that he had, in the year 1808, the present unencumbered income of £99 a year only, and the interest in reversion *of £1,154, [*214] charged with these annuities. Previous to the year 1808, he being then Colonel of the North Lincoln Militia, appointed persons, who were in partnership with Mr. Bruce, which partnership was afterwards dissolved, and Mr. Bruce supplied their place, to be agents for him, in his capacity of Colonel of the Regiment. In the month of March, 1808, he was labouring under very great pecuniary embarrassments, having, at the time, a family of six or seven children, without any means of supporting himself and them, except that which was derived from the above income, and the profits he might derive from his Colonelcy. In March, 1808, an agreement was made, which appears to have been merely verbal, that he should sell to Mr. Bruce the whole interest which he had in this income in possession, and in remainder, for a sum of £15,500, but it was part of the agreement that the annuity which he had during the joint lives of himself and his father should be made, as far as he could an annuity for his own life, in the event of his surviving his father.

(g) M'Clel. & You. 99.

(h) V. C. Ap. 15, 1831, MS.

The agreement having been made on the 25th March, 1808, between that day and the 27th April following, several sums, many of which were very small, were paid by Mr. Bruce, on the account of Lord Portmore, amounting together to £2,421 and a fraction; and a bond was given for the payment of them, with interest. It appears that between the said 27th April and the 12th of the following May, several other sums of money, which were also small, *were paid by Mr. Bruce [*215] on account of Lord Portmore, making, together with the preceding sums, £4,950; and on the 12th May, 1808, a warrant of attorney was given for the payment of the whole with interest, and on the same day articles of agreement, in writing, were executed, for making the before-mentioned sale; part of the agreement was, that Lord Portmore should bear all the expenses of the necessary deeds for giving effect to the transaction, and also the expenses of filing a memorial, in case it was thought necessary. And it was agreed that the £4,950 should be taken as part of the purchase-money. It appears also that judgment was entered up on the warrant of attorney, and then further sums advanced, many of which were very small; and certain policies of assurance had been effected, and premiums on them were paid, the policies being for short periods, and the premiums small; and it appears that interest was allowed by Lord Portmore on these premiums. The whole sums which were so paid, and for which Lord Portmore became indebted, after giving credit for a small sum received on his account in respect of regimental matters, amounted to £6,612 10s. 2d. A deed was executed for the purpose of carrying into effect the original agreement, bearing date the 14th March, 1810, which was made between a number of persons, in whom was centred the interest of the annuities granted, and Lord Portmore and Mr. Bruce, and persons who were trustees for him; and it appears that a sum of £11,800 and a fraction had been paid *by [*216] Mr. Bruce to the holders of the annuities for the re-purchase of them. Payments were made in pursuance of that deed, and the transaction remained unimpeached until after the death of the father of the present Lord Portmore, who died in the month of November, 1823. At that time the present Lord Portmore was abroad, and it does not appear that there was any payment made by those interested after the death of his father, although it seems some negotiation passed between his solicitor, and those who represented the assignees of Mr. Bruce; and in September, 1825, the bill was filed for the purpose of rescinding the transaction.

The question arising on these facts was whether a court of equity ought to allow this transaction to stand. His Honour the Vice-Chancellor, after adverting to the doctrines laid down by Sir W. Grant in *Gowland v. De Faria*,⁽ⁱ⁾ proceeded thus:—"But it does not appear, for the purpose of deciding the case before me, that it is necessary to determine how far the proposition attributable to the late Master of the Rolls, Sir W. Grant, is, or is not, borne out by the cases; but on looking at a great number of cases which are to be found on this subject, it appears to be placed beyond all doubt, that where a person who stands in the situation of heir apparent is in distress, and deals with a party who is aware of the distress, and sells *his reversionary interest for a price which is manifestly not its worth, this court will set aside the sale; but that [*217]

(i) 17 Ves. 24.

proposition cannot be applied in cases like that before me, without some consideration; because according to the facts stated, the transaction was not merely for the purpose of purchasing the reversionary interest, but part of the subject of sale was the interest in possession, and it is with reference to the magnitude of the interest in reversion that the question arises. The whole price which was to be paid was £15,500, and the sums which were paid for the re-purchase of the annuities amounted to £11,800, and that would therefore leave a balance of about £3,700. It appears, by the examination of Mr. Morgan, that in 1808, at which time the present Lord Portmore was of the age of thirty-six, and his father sixty-six, so that in 1810 he would be thirty-eight, and his father sixty-eight, that the aggregate value of all the interest to be sold amounted to £24,904, and the aggregate value of the same interest in 1810, at the time when the deed was executed, would amount to £24,698, whereof the sum of £6,526 is to be attributed to the value of the reversionary interest. It appears, also, by Mr. Morgan's calculation, that the value which he put upon the annuity during Lord Portmore's life in 1810, was something more than twelve years' purchase, because the first piece of the defendant's evidence is to show that £6,060 was the price of the annuity for £500 during his life. Lord Portmore was in such a situation that it was utterly impossible *for him to redeem the annuities; and the sum of [*218] £11,800 seems to be properly attributed to redeem the annuities; about that there is no question; and, therefore, if I consider that the thing substantially sold was the present income of £99 a year during his life, and the reversionary interest of £1,164, and if according to the scale of calculation which Mr. Morgan has given, something about £1,200 be considered as the price of the interest in possession of £99 a year, we shall have the actual value of these interests by merely taking the aggregate of the two sums of £1,200 and £6,526. Now the sum which remained of the £15,500, after deducting that which was to be applied to the redemption of the annuities, was only £3,700, and, therefore, not half the sum that would be necessary to make up the value, according to Mr. Morgan's calculation.

“That the solicitor of Lord Portmore was largely consulted as to the form of the deed is sufficiently evident; but it does not appear that any person whatever was consulted as to the quantum of consideration to be given for the thing. The case, therefore, stands very much within the nature of that proposition, which Lord Eldon has thrown out in *Davis v. the Duke of Marlborough*, where he says, that he “should certainly hesitate long before he laid it down as a principle; that if an heir apparent, dealing substantially for his expectations, is dealing also for a present obligation, which it is hardly possible he should discharge, or throwing in a present possession, worth but a small proportion of the whole, he is not entitled to *the protection given to heirs apparent dealing for their expectations.” In this case the value of [*219] the annuity bears but a very small proportion to that which was estimated as the value of the reversion—about one-sixth—not quite. Upon considering these facts, it appears to me that it would be clear, beyond a doubt, that, standing in the situation in which Lord Portmore did, if the contract had only been for the sale of the reversion at such a price as appears in fact to have been here given for it, the court would not have allowed the transaction to stand; and it does not seem to me, that the

mere circumstance of their being thrown in the interest in possession, amounting to £99 a year, ought to vary the substance of the case. It is true that there is only the evidence of Mr. Morgan as to the value; but then there is this further piece of evidence, which shows the opinion of the value of the contract by Mr. Bruce, evidence furnished by one of the defendant's witnesses, that in 1813 the sum of £25,000 was offered to be given for the interest purchased, and that sum was refused. It seems that in some cases a question has been made, whether the evidence of an actuary such as Mr. Morgan is, should of itself be taken to be sufficient. I cannot myself conceive why it should not be so, when there is nothing to contradict it; but at all events, where I find it is corroborated by the defendant's own evidence, it appears to me, I am bound to receive that which Mr. Morgan has given as his opinion of the value [*220] as being *the true value. In the case of *Headen v. Rosher*,^(k) which was before the late Lord Chief Baron, he did not think it right to set aside the purchase which was made of a reversionary interest, where the sum that was paid was about two-thirds of the value; but then it must be observed, that case stood on very singular circumstances. That there had been a previous attempt to sell the reversion in question and some other interest, and a sum of £928 had been bid; and the title appearing defective in part, there was a second sale. There appears, in that case, to have been nothing like any use made of the distress in which the party stood. And my Lord Chief Baron stating that he did not assent to the proposition found in *Gowland v. De Faria*, refused to set aside the transaction, and in my opinion the judgment of the Lord Chief Baron is perfectly unimpeachable. In *Nicholls v. Gould*,^(l) Lord Hardwicke refused to set aside a transaction which consisted in the purchase of a reversionary interest, but there the reversionary interest was one which depended on the failure of issue of a party who was to die, and Lord Hardwicke said it was quite impossible to make any calculation of that interest, and that was one of the grounds on which he refused to interfere in the case. And in *Moth v. Attwood*,^(m) Lord [*221] Alvanley refused to set aside a transaction *where there had been a purchase of a reversionary interest for two reasons, as they appear on the face of the report, that in the first place I think his expression is, that the interest had been hawked about all over the town before the defendant was induced to buy it on the application of the plaintiff *Moth*,⁽ⁿ⁾ and secondly, that the bill was filed twelve years after the transaction. And in the case of *Whalley v. Whalley*,^(o) first the Master of the Rolls, and afterwards the House of Lords refused to set aside the

(k) M'Cl. & You. 89.

(l) 2 Ves. sen. 422.

(m) 5 Ves. 845.

(n) Lord Alvanley's observations, in pronouncing judgment were as follows:—"This is one of those unfortunate cases upon which the court, feeling that the transaction is not quite of the complexion to be wished, yet, under all the circumstances, is not at liberty to grant the relief prayed. The plaintiff was very indigent, and of very dissipated manners. The evidence as to the value of the estate is very contradictory, as it always is. It is clearly admitted it was offered over and over to all the town, to twenty persons. That circumstance is decisive; and would alone be sufficient to dismiss a bill brought at the distance of twelve years from the transaction. This man was not going about, or lying by, to avail himself of an opportunity to get a good bargain. The bill must be dismissed with costs. I admit it is a very considerable bargain, but there was no fraud or circumvention. It was done deliberately; and not in consequence of a plan laid to gain a good bargain."

(o) 1 Meriv. 536; S. C. 3 Bligh, 1.

transaction, and among other reasons, that the bill was filed forty years after the transaction took place. (*p*)

*"Now in this case I do find what I conceive to be gross inadequacy, and an advantage taken of distress in this way. [*222] The agreement having been made merely, as I understand, verbally, in March 1808, it was acted on by Mr. Bruce, who must have been aware, by the payments he was making, what was the situation of Lord Portmore, by making him small payments from time to time, and so evidently intending to hold him to the bargain which he had verbally made in March 1808; because no person, ordinarily speaking, could have had the advances *made to him on the footing of the agreement [*223] without feeling himself in some degree bound to go on with it, and, in point of fact, the very nature of the sums which are detailed as having been paid, from day to day, at three distinct intervals of time stated in the deed, shows the grinding distress under which Lord Portmore laboured, and the way Mr. Bruce thought proper to deal with him labouring under that distress. The fact, that Lord Portmore was the heir apparent, not merely of his father, but also the expectant heir of a peerage, appears to me also to bring the case distinctly within the general rule founded on public policy, namely, that this court will not allow the heir of a family of rank to be drawn into situations of poverty and distress by those who are dealing with him, when the subject of discussion is as to reversionary interest.

"Lord Portmore's circumstances do not appear to have varied in the least from the time the deed was executed in March 1810, until the death of his father; and upon the death of his father he does nothing whatever to give any validity to the transaction, but the bill is filed in 1825, and it appears impossible for me to say that there has been any acquiescence in the transaction, or any thing like considerable delay on the part of Lord Portmore in coming forward to rescind the transaction; and therefore the circumstances that arose in *Moth v. Attwood*, and *Whalley v. Whalley*, and many other cases of the same nature, are totally inapplicable to the present case.

*"My opinion, therefore, on the whole of the case is [*224] this, that the plaintiff is entitled to the relief which he asks; and having regard to the way in which the pleadings are constructed,

(*p*) His Honour seems to have been under a misapprehension as to the grounds of the decision. There were three points raised on the case. 1st, Whether the transaction was to be considered merely as a sale. 2nd, If so, whether the inadequacy of price furnished sufficient evidence of fraud. And 3rdly, Whether, under the circumstances, the length of time was a bar. Sir W. Grant decided the case expressly on the first ground, with respect to which he is reported to have said, "the conveyance, which is from an uncle to a nephew, purports to be made in consideration not only of certain annuities, but also of 'natural love and affection.' If the court is to take the latter to have really formed a part of the consideration, there is an end of the plaintiff's case; for where bounty is intended, there is no room for the inference of fraud from the inadequacy of the price. Love and affection would alone have supported the conveyance without any pecuniary consideration, and will equally support it when there is a pecuniary consideration, wholly inadequate to the value of the estate." And His Honour being of opinion on the consideration of the circumstances of the case, that bounty was intended, he dismissed the bill on that ground, and declined entering into the consideration of the other points. Lord Eldon, on appeal to the House of Lords, came to the same conclusion, by nearly the same process of reasoning as Sir W. Grant had adopted, expressly declaring that "he did not rely on lapse of time;" and Lord Redesdale, putting a contingent case, seems to have thought that the lapse of time would have been a bar, had it been necessary to decide the case on that ground (3 Bligh, 1.)

though several matters are introduced into the bill, which are not substantiated in evidence, yet it appears to me that, independently of many charges that seem to have been put into the bill upon conjecture, there is quite enough to entitle the plaintiff to relief.

"Upon looking into the case which regard relieving against bargains of this kind, a great variety of courses seem to have been adopted with regard to the costs; but considering the whole of the circumstances together, and what has been done in former cases, it appears to me in that respect that there should be no costs up to the hearing; and following what Lord Thurlow seems to have laid down as the rule in the case of *Gwynne v. Heaton*,^(q) the costs of taking that account, which is necessarily incidental to the relief which the plaintiff asks, must be borne by him."

From this decision there was an appeal to the Lord Chancellor, when the case was very strongly argued on both sides; and, after a lapse of several months, Lord Brougham simply affirmed the Vice-Chancellor's decree, without going into the merits of the question. The ground upon which the case was most urgently put in support of the sale, on the argument upon the appeal, was, that the transaction was substantially a sale, not of a reversionary interest, but of an interest *in possession. It is impossible, however, not to perceive that this branch of the argument, though very strongly and ably put by counsel proceeds upon the assumption that the owner of a life-estate, which he has completely exhausted by granting annuities, still retains substantially the control of it. This however may be fairly met by asking, if Lord Portmore could have redeemed the annuities? clearly he could not until his reversion fell into possession,—it follows, therefore, that the interest which he had to sell, whatever it might be in form, was in substance reversionary.^(r)

SECTION VI.

Of the Decree at the Hearing.

Assuming that the contract is liable to none of the objections which have been considered in the preceding Sections of this Chapter, the decree at the hearing establishes its validity, and directs a reference to the Master, to enquire whether the vendor can make a good title. It was formerly usual to introduce a declaration to that effect *into the decree; and this was done either by declaring that the plaintiff was entitled to a specific performance, if a good title could be shown, and then directing a reference as to the title; or by ordering that the title be referred to the master, and following up that direction by a declaration, that if a good title was shown, the agreement ought to be specifically performed. And though it seems that re-

(q) 1 Bro. C. C. 1.

(r) See farther on this subject *Blakeney v. Bagott*, (3 Bligh, N. S.) which was the case of an agreement for the reversionary lease by an attorney from the son of his employer, remainder-man in a settlement, under which his father who had granted the existing lease, was tenant for life, the order of the court below refusing to enforce the contract, was affirmed. And see also the cases cited. (*Ibid.* 253, n.)

cently it has been usual to omit this declaration, yet it may well be doubted whether this be any improvement. Lord Eldon, in *Stevens v. Guppy*(s) intimated his opinion, that difficulties might frequently arise from omitting to make such a declaration in the decree: and in *Pitt v. Davis*,(t) his lordship said, "that where the question of title is not the only issue, but the defendant insists that, whether the title be good or bad, the plaintiff is for any reason not entitled to specific performance, it is specially necessary that there should be in the first instance a declaration that the plaintiff is entitled to have the contract specifically performed, if a good title be shown." Where, however, the decree merely directs a reference to the master, as to the vendor's title, it seems that this must be taken by implication to mean, that, if he can make a good title, the purchaser is bound to accept it; and accordingly it is the present practice to direct, at the hearing, only a reference as to the title, reserving the declaration, that the plaintiff is entitled to have the agreement *specifically performed, for the decree on further di- [*223*]
rections.

The decree at the hearing is in the following form:—

The court doth order that it be referred (1) to Mr. _____, one &c., to inquire whether a good title can be made to the estates comprised in the agreement in the pleadings mentioned. And it is ordered that he do state his opinion thereon to the court. And in case he shall be of opinion that a good title can(2) be made, it is ordered that he do inquire and state when it was first shown that a good title could be made. And for the better discovery of the matters aforesaid, the parties are to produce before the said Master upon oath, all deeds, papers, and writings, in their custody or power relating thereto, and are to be examined upon interrogatories as the said master shall direct. And this court doth reserve the consideration of all further directions and of the costs of this suit, until after the Master shall have made his report. And either of the parties shall be at liberty to apply, &c.

(1) *Of the Reference to the Master as to Title.*

It has already been observed, that the only question at the hearing of the cause is the validity and equity of the contract; the question of title does not then come into discussion. Hence the bill cannot be dismissed at the hearing on the ground of the title *being bad; provided the contract be good in point of form, and such as it is [*224*] reasonable to enforce in point of equity. From the earliest period at which in suits of this description courts of equity took cognizance of the validity of the title, it has been held to be sufficient if the vendor could make a title before the master signed his report; and therefore a mere objection to the title is not a ground for dismissing the bill at the hearing. Obvious as this consideration appears to be, it has not always been attended to.(u) It has, however, been a settled principle since the

(s) 3 Russ. 182.

(t) Ibid. in note.

(u) In *Omerod v. Hardman* (5 Ves. 722,) the bill was dismissed at the hearing on an objection to the title; Chambre, J., said, on appeal "against this decree it was said, there is an invariable rule, that the court ought not to decide upon the validity of the title, whether it

case of *Jenkins v. Hiles*,^(v) that if the court be satisfied with the content of the tract, it is, of course, at the hearing, to grant a reference to the master to enquire whether a good title can be made? The object of this reference being on the one hand, to give the vendor an opportunity of perfecting his title before the master, and, on the other, to afford to the purchaser the means of having the title thoroughly investigated and established.

This is not merely a rule of practice, but it is founded in principle, which is somewhat of this nature: that if, instead of bringing an action of damages for breach of covenant, the plaintiff comes into a court of equity for a specific performance, the defendant has a right not only to have such a title as the plaintiff offers upon the abstract unauthenticated, but, in consideration of the relief sought in equity, beyond what the law could give him, to have an assurance about the nature of his title, such as he cannot have elsewhere. Therefore the court never acts upon the presumption that a satisfactory abstract was delivered, unless the purchaser has already clearly bound himself to accept the title upon the abstract; and though the abstract is in the hands of the purchaser, who says he cannot object to it, yet he may, nevertheless, insist upon a reference. Why? Because the decree compels the other party to produce all the deeds, papers, and documents, in his custody or power, from which reasonable and solid objections to the title may be furnished; which would never have fallen under the view of the purchaser, unless the court wrung from the conscience of the vendor that sort of information, which a purchaser could by no other means acquire. Inquiries and examinations also may be directed, by which the title may be sifted in a way in which it never could upon a mere abstract, authenticated as the vendor might think proper. The rule, therefore, is founded upon a right that gives specifically all the assurance which, in the nature of things, one party can have from sifting the conscience of the other, who sues him in equity as to the matter of title.

This is the general rule of practice; but of course, like every other right, it may be waived, either by express declaration or by acts tantamount. And this is all that Lord Eldon can mean, when, after laying down the rule, and explaining it in the spirit of the preceding observations, he adds:—"I have never understood that the rule has gone this length, that the defendant, against whom a specific performance is sought, may not, by an answer, unequivocal—to which he was not drawn by surprise—the propriety of which is not rendered disputable by any subsequent discovery,—waive the benefit of the principle, and come here saying, in effect, he trusts the representation of the plaintiff, without the

is such as a purchaser ought to accept in the first instance; but the title ought to be sent to the Master or the officer of the court, and should be taken into consideration by the court, upon his report. If there were an inflexible rule of that sort it would dispose of the case. But if no authority had been cited, I should find it very difficult to accede to that idea, that there should be such an inflexible rule. We are, however, relieved from any difficulty from the circumstance of a very recent and decided authority by the Lord Chancellor." In *Rose v. Calland* (5 Ves. 186,) the case alluded to, the question was, whether a certain part of the estate was free from the tithe hay,—a question of contract not of title (*Smith v. Lloyd*, 2 Swanst. 224, n.; 8. P. 1 Mer. 104;) and consequently it was no authority for the proposition, that the bill may be dismissed at the hearing for defect of title.

(v) 6 Ves. 646.

obligation of an oath; and offering, in the first instance, to the consideration of the court, one neat dry point, upon which alone his objection rests;" his Lordship adds, "the rule has not been considered so absolute." The whole import of these elaborate expressions comes to this,—that either party to the suit is, as matter of right, entitled to have a reference,—that this right may be waived by the purchaser, if he be so minded; and that such waiver may *be either by express [*227] words, or by acts which show that his intention was to waive, and that he actually has waived his right to have the title investigated. Whenever this happens, the court will decree the specific performance of the contract at the hearing, which puts an end to the suit.

It is proper here to notice a practice peculiar to suits for specific performance, of comparatively recent origin, and which arises in a great degree from the peculiar character of this species of suit. For the purpose of explaining the nature of the practice here adverted to, it may be necessary to recall to mind, that the only point decided at the hearing is the validity of the contract, and the reasonableness of enforcing it; the goodness of the title being reserved for subsequent consideration. In many cases it is obvious that the contract is such as cannot be disputed, or such as the parties may have no wish to dispute, the purchaser being willing to complete on having a good title. Whenever this happens, it is manifestly useless to bring the cause to a hearing, there being in point of fact nothing to try at that stage of it, the only matters in litigation between the parties being the ulterior question as to the title. To have the cause set down for hearing, can answer no other purpose than that of encreasing the expense, and delaying the final termination of the suit. It seems reasonable, therefore, that, on the coming in of the answer admitting the contract and submitting to perform it on a good title being shown, it should be competent for either party to have at once a reference *to the Master to inquire Whether a good [*228] title can be made? without going through the intermediate formal and dilatory process of regularly setting the cause down for hearing. Such, in point of fact, is the modern practice.

In a suit therefore for specific performance in which the single question is, whether the plaintiff can make a good title? the court at the present day directs a reference to the Master to inquire into the title,(w) and this even without the consent of the other party;(x) but it seems in the Exchequer, where the title is denied by answer, this practice does not prevail without consent.(y) The reference having been obtained in the first instance on motion, the further directions may also be had on motion, and it is not necessary to set the cause down for that purpose.(z) Lord Eldon says that it was long thought, that the cause must be heard on further directions, but that he altered the practice, thinking that, after the first question had been decided on motion, the cause might be so disposed of.(a)

(w) *Brooke v. Clarke*, 1 Swanst. 551, per Lord Eldon.

(x) — *v. Skelton*, 1 Ves. & Bea. 519; but see *Harford v. Purrier*, 1 Madd. 532, where this is doubted.

(y) *Bowyer v. Bright*, 3 Price, 300.

(z) *Whitcombe v. Foley*, 6 Madd. 3.

(a) *Brooke v. Clarke*, 1 Swanst. 551.

So on the other hand the purchaser may, on motion, have the bill dismissed with costs; it being competent for the court on such a motion to [*229] give costs, without setting down the cause for further *directions; Lord Eldon observing on such an application, "after the best consideration I can give the subject, I think it may be done on motion. It would be mischievous, if the court, going such a length in suits of this kind on motion, could not follow it up in the same way." (b)

It follows as a necessary consequence that if the motion for a reference involve any other question, than that of title, it will be refused: and therefore when the subject matter of the purchase was leasehold estate, and the only question was, whether the purchaser had a right to see the title of the lessor, as nothing more could appear on the report, the court refused a motion for reference on the ground, that this practice having been adopted to avoid expense, it ought not to be resorted to in a case like this, where it would have the effect of increasing it. (c)

The reference may be had even before answer on an admission at the bar, that there is no other question than that of title; (d) or where the defendant has done such acts of ownership or otherwise, as have clearly waived any question as to the contract, which may be considered as tantamount to putting in an answer; (e) or upon the plaintiff undertaking to do all such acts, for the purpose of executing what the court thinks [*230] right, as if the answer were put in, or the cause *brought to a hearing; (f) but if it be alleged at the bar, that there are other questions besides that of title, the court will not grant the motion before answer. (g)

The reference will be directed on motion before the hearing, only in cases where there is no other question than that of title; for, if the answer to a bill for specific performance raise any other objection to the performance of the contract than a defect in the title, it seems to be settled (although the cases are not uniform) that the cause must go on regularly to a hearing, and that the court will not examine whether the objections be frivolous or not; that being a matter which can be properly decided only when the court is in possession of the evidence. In *Blyth v. Elmhirst* (h) the doctrine of the court is explained by Lord Eldon in something like the following words:—"Where the defendant by his answer says, there is no objection to the agreement, except what arises from the circumstance that the plaintiff cannot make a title, the court has conceived itself to have an authority in the answer equivalent to the declaration in its own decree 'that the agreement ought to be performed;' a sort of confession by the answer, that it ought to be executed; and, [*231] therefore, upon such an answer, the *court has gone the length of directing a reference to the master to see, whether a title can be made; but, if the answer, upon reasons solid or frivolous, insists that the agreement ought not to be executed, then the plaintiff

(b) *Walters v. Pyman*, 19 Ves. 352.

(c) *Gompertz v. —*, 12 Ves. 17.

(d) Per Lord Eldon, in *Conner v. Johnstone*, 1 Mer. 372.

(e) *Dixon v. Astley*, 1 Mer. 373.

(f) *Balmain v. Lumley*, 1 Ves. and Bea. 224.

(g) *Mathews v. Dance*, 3 Madd. 470.

(h) 1 Ves. and Bea. 1. And see *Paton v. Rogers*, 1 Ves. and Bea. 352, where the doctrine is similarly stated, and *Portman v. Mill*, 2 Russ. 570.

must proceed as in ordinary cases, and bring the suit regularly to a hearing."

In another case it is stated that "the rule is quite obstinate that a reference of title cannot be had, except in cases where there is no question but that of title; and the reason is, that otherwise the court would fall into the absurdity of having the Master's report upon a title, and then a subsequent determination that there was no subsisting agreement.⁽ⁱ⁾ Whether there may be a case of fraudulent allegation, sufficiently strong to form an exception to this rule, is a point not settled, though Lord Eldon declared he would not go the length of saying there might not be such a case.^(k) It may be doubted, however, whether even the most fraudulent allegations would form an exception, since the question of fraud would have to be tried; and it does not appear how this could be satisfactorily disposed of except at the hearing, when the court had all the evidence in the cause before it.

The doctrine stated in the preceding paragraphs has undergone considerable discussion in several subsequent cases which, although in some sense contradictory, *yet the result of the whole will probably [*232] be found to concur in the proposition, which has been already laid down, that if the answer allege other matters besides the title, although that allegation may be unfounded, or even fraudulent, yet, the cause must go on regularly to a hearing. A leading case on this subject is *Boehm v. Wood*.^(l) There the agreement was dated the 26th July, 1819, and provided "that an abstract of title should be delivered by the 10th August, that the conveyance should be executed on or before the 29th September following, and the purchaser, upon payment of his purchase-money, was to be let into possession." The abstract was delivered accordingly, but objections having been taken to the title, the vendor was informed that the purchaser had, in consequence, been under the necessity of relinquishing the purchase. The main objection was, that the estate in question, together with other property, had been vested in trustees, by a deed, which it was contended was an act of bankruptcy. In another suit commenced against the purchaser of other property, this question had been raised, a case sent to a court of law, and after proceedings that occupied considerable time, it was decided that the deed was not an act of bankruptcy. The defendant in his answer stated that he had purchased with a view to immediate residence; and that he would not have entered into the agreement if the vendor and his agent had not assured him that *he should have possession at Michaelmas, and that possession not having been given, he insisted that [*233] he was not bound to perform the contract. On a motion for a reference of title, it was insisted by the counsel for the defendant that the question of title, was not the only issue, but that the answer tendered another issue, namely, "that time was of the essence of the contract," and consequently that the reference could not be granted. It was also said by counsel for defendant, "that it was admitted in this case, that no purchase could be made without a judicial decision, and many conveyancers thought the deed was an act of bankruptcy." Lord Eldon said, "If another matter is put in issue besides the question of title, it falls within

(i) *Morgan v. Shaw*, 3 Mer. 140.

(l) 1 Jac. and Walk. 419.

(k) *Ibid*.

the common rule; but then, must not the court take care to see that, that other matter is something,—that it is substantial?”

In *Withy v. Cottle*,^(m) on the motion for a reference on the coming in of the answer, it was objected that besides the question of title there was also this, that the contract had not been performed within the time fixed by the conditions of sale; an objection which it was argued on the one side was frivolous and merely for delay; and, on the other, that the subject matter of the contract being a life annuity, the value of which must necessarily be diminished by effluxion of time, that this was precisely the case in which time must be of the essence of the [*234] *contract, and, therefore, that the objection was substantial. The Vice-Chancellor, feeling himself embarrassed by the conflicting decisions and *dicta*, which have been here stated, intimated a wish that the motion should be made before the Lord Chancellor, when Lord Eldon expressed his opinion that the objection was not frivolous, and refused the motion without costs.

The same question was again raised in *Gordon v. Ball*,⁽ⁿ⁾ where it was objected on behalf of the purchaser, “that there was a right of way across the estate, the existence of which had been concealed from him, and which, if he had known of it, would have deterred him from purchasing.” On the motion for a reference, the doctrine, that “where there are other objections besides the title, the court will not consider whether they be substantial or not” was much argued, though the motion was disposed of on another ground. His Honour the Vice-Chancellor observing, however, with reference to this doctrine, “that the consideration, whether an objection is to be considered unsubstantial, involves great difficulty. In order to determine whether the other objection be or be not unsubstantial, it must for the purposes of this motion, be taken to be founded in fact; and being to be considered by the Court, it is difficult to say that it is not to be open to the argument of counsel.

[*235] If the objection is to be considered as unsubstantial, *wherever the Court is of opinion that it cannot be supported, then the whole merits of a cause may come to be argued, and to be decided upon motion, instead of decree, and upon an assumed statement which may have no existence in point of fact. If the objection, in the opinion of the court, be invalid, and yet is not to be considered as unsubstantial, then the case becomes still more embarrassing, and neither the court nor the counsel can know very well how to treat it. Is the court to say the invalidity of the other objection is too clear for argument, and therefore it is unsubstantial? Then the question of substantial or unsubstantial comes to depend upon the constitution of mind of the particular Judge. At the same time it must be admitted, that there may be cases in which the other objection is of such little weight, that there may be reason to consider it as stated for the purpose of delay, and in order to escape an immediate reference as to the title. But this immediate reference being in its nature an extraordinary indulgence to the plaintiff, out of the common course of proceeding, the consideration is, whether it is not better where the defendant states even a frivolous objection (which it is to be remembered must, as to the facts, be always made upon his oath, and as to the law, be sanctioned by the signature of counsel) rather to compel

(m) 1 Sim. and Stu. 174.

(n) 1 Sim. and Stu. 178.

the plaintiffs to adhere to the common course of proceeding than to encounter the difficulties which must unavoidably arise from a different course."

This reasoning appears to be so satisfactory and *conclusive, that it is not likely the question will be again raised. [*236] The rule that the court will not direct a reference on motion, is direct, clear, and simple; to modify this rule and say, that in each particular case, where it is alleged that there are other questions, the court will consider whether they be frivolous or not, and in one case grant the reference, and in the other refuse it, would lead to infinite uncertainty and needless discussion; a discussion, too, which would very frequently be unsatisfactory, carried on, as it must necessarily be, in the absence of the evidence to be taken in the cause, on the effect of which the nature of the objection might entirely depend. That sometimes frivolous objections will be taken, merely for delay, cannot be questioned, and the effect of this is of course to work some injury to the other party,—but it can hardly be said to work injustice, inasmuch as the granting the reference in any case on motion is an indulgence, and it is manifestly much better that this indulgence should be withheld occasionally, than that the whole administration of justice should be complicated and involved in curious and refined distinctions.

It was at one time said by Lord Eldon, that the policy of this practice of referring the title on motion being questionable, it is not to be extended by analogy. On this principle he constantly refused to extend it *to suits for an account, although the analogy between the [*237] two cases seems to be exact,—for in a suit for an account the only question at the hearing is, whether the defendant be a party liable to account to the plaintiff, and then if the court be of opinion that he is, a reference is directed to the Master to take the accounts. It seems reasonable, therefore, that a reference should be at once directed to the Master on the answer of the defendant coming in and submitting to an account. This Lord Eldon never would permit, resting his objections, however, on reasons fanciful and ingenious, rather than solid and convincing. Even the change of practice with respect to suits for specific performance did not in the first instance meet with his approbation; nor, indeed, till after he had finally determined, that the practice adopted in these cases should not be extended to suits for an account. He did, however, alter his opinion, for in *Fullagar v. Clarke*, (o) we find him saying, "I remember the first instance of reference of title upon a motion by Sir James Mansfield, and without, as I have formerly noticed, any expectation of succeeding. We did, however, succeed; and the practice, as then established, has ever since appeared to me very beneficial. I have discovered no sort of mischief, and much good in it, as saving expense and time." And in *Bonner v. Johnstone*, (p) adverting to this subject, he is reported to have said, that "so far from apprehending that the *practice of the court was altered for the worse, I [*238] am quite satisfied that much delay and expense have been spared by allowing that to be done on motion, which could formerly only have been

accomplished by decree; and this ought to be better known to those who complain that the time of the court is wasted in hearing motions."

Where there is a reference upon title, the reference must be complete, and extend to all that regards the title, but not to other matters; and upon this principle a reference having been obtained, it was extended on motion, in case the Master should be of opinion that a good title could be made, "to inquire and certify whether it appeared in and by the abstract in pleadings mentioned, that the vendor could make a good title."(*q*)

(2) *Of the time allowed Vendor to make a good Title.*

After the practice was introduced of having a reference to the Master on motion on the coming in of the answer, it soon became common, in the first instance probably by consent, to introduce into the order a direction that it should also be referred to the Master, to inquire at what time it appeared by the delivery of the abstract, that a good title could be made. Lord Eldon, however, conceived that it was not according to the strict practice to make such an order until it was ascertained by a report, whether there was a good title or not.(*r*) It is now, however, clearly settled, that where the reference is made in the first instance merely as to the title, whether that reference be directed by a decree or upon an interlocutory motion on the coming in of the answer, the purchaser is entitled to have an inquiry at what time a good title could be made.(*s*)

The form of the decree is "whether a good title *can* be made," not whether it could be made at the time of entering into the contract. This is the constant form of the decree at the present day, and is to be found in *Langford v. Pitt*,(*t*) decided by Sir Joseph Jekyll; but it was long before these words were understood according to their present acceptance. It might be thought from the form of the order, that, it would be sufficient if a good title could be made before the master's report; but the practice of the court does not appear to have been so understood till a comparatively recent period. In *Wynn v. Morgan*,(*u*) the vendor, after entering into articles to sell the fee simple, and after the bill was filed, found that he had only a term of one thousand years, but before the hearing of the cause obtained the fee simple by an act of parliament. It was [*240] objected that the vendor not having a title at the date of the contract, it ought not to be enforced. Sir W. Grant, overruled the objection, saying, "that it is necessary to determine, generally, whether a plaintiff can, at any distance of time come to this court, and say he is now ready to make a title, though he could not at the time the contract was entered into, and when it ought to have been carried into execution; but I am called upon to determine the converse of that, and

(*q*) *Jennings v. Hopton*, 1 Madd. 211.

(*r*) *Gibson v. Clarke*, 2 Ves. and Bea. 103; and see *Jennings v. Hopton*, 1 Madd. 211.

(*s*) *Daly v. Osborne*, 1 Mer. 382; *Birch v. Haynes*, 2 Mer. 444; see *Jennings v. Hopton*, 1 Madd. 211; *Hyde v. Wroughton*, 3 Madd. 279; *Anon.* 3 Madd. 495.

(*t*) 2 P. W. 632.

(*u*) 7 Ves. 202.

to say if the plaintiff cannot make a completely good title at the time the contract ought to have been carried into execution, he never can come for an execution. That would contradict the whole current of authorities, and would be in opposition to the uniform practice; for it is in the experience of us all, that it has been absolutely necessary for the party insisting upon the contract, to do something to enable himself to convey a completely good title; and yet, either the objection has never been taken, or it has never prevailed, for there is not a single instance of its having prevailed so nakedly stated."

In *Mortlock v. Buller*(v) an extension of this doctrine is recognized by Lord Eldon, it being there laid down by him as the result of the authorities, that if a vendor can, even by an Act of Parliament, obtain a title before the report, he is in time. In that case, however, his lordship seems to have disapproved the doctrine.(w) *So in [*241] *Coffin v. Cooper*,(x) (which was the case of a sale under a decree of the court, though that circumstance does not appear to have been taken into account, nor to make any difference,) the master reported against the title, but it was shortly after perfected by an act of parliament. The purchaser subsequently to this applied to be discharged from his contract, on the ground of the master's report, and insisting that as there was not then a good title, he had a right to be discharged; but this was denied, Lord Eldon saying, "there is no such rule as is suggested: where the master's report is, that the vendor, getting in a term, or getting administration, &c. will have a title, the court will put him under terms to procure that speedily."

Notwithstanding the clear and conclusive manner in which the doctrine is stated in the authorities which have been mentioned, the same objection was taken and relied upon in a recent case, as it would seem, with great confidence. In *Hoggart v. Scott*,(y) the plaintiffs, under an erroneous impression that, as the personal representatives of certain trustees for sale, the execution of the trusts had devolved upon them, in November 1825 entered into an agreement to sell part of the property to the defendant. In February 1826, this *mistake was discovered, and the purchaser was apprised that the vendors [*242] would take the necessary steps for getting in the legal estate, which was outstanding in an infant heir. A petition was accordingly presented for this purpose in June 1826; difficulties occurring in the prosecution of the reference, the purchaser's solicitor in September 1826, and afterwards, repeatedly applied to the plaintiffs, either to complete the title or return the deposit, and their solicitor communicated to him the proceedings, which were going on. On the 26th of May, 1827, the Master made his report, which was shortly after confirmed; and on the 30th of June, 1827, a further abstract was delivered. A suit was then instituted for the appointment of new trustees, and under an order of court, directing the infant to convey the estate, in December 1827, it became vested in the plaintiffs. In the preceding month of May, the defendant had commenced an action for his deposit and had a verdict; in October,

(v) 10 Ves. 315.

(w) "I agree if a person carries an estate to market, not having any title at the time, it is much too late to discuss the question whether it would have been wholesome, originally, to have held that he should not have a specific performance. Ibid.

(x) 14 Ves. 205.

(y) Russ. & Mylne, 293.

the same year, the plaintiffs filed their bill. An objection was taken at the hearing, that the plaintiffs at the time of the contract, had no power of sale, and therefore, that the contract could not have been forced. The objection, it is clear, is precisely of the same nature as that made in *Wynn v. Morgan*, although it was attempted, in argument, to distinguish the two cases, it being contended that the objection here "was not merely to the title, but to the plaintiffs, as persons who at the time when the agreement was signed, were not capable of entering into a binding contract." It is difficult

[*243] to see what this distinction means, but if it have any meaning at all, it is very plain, that it might have been applied in the same words in *Wynn v. Morgan*, when the plaintiff, having only a term of years, undertook to sell the fee simple. The plaintiff neither in the one case or the other, had, at the time of entering into the contract, or at the time of filing the bill, the estate which he had contracted to sell; but in both cases had acquired before the hearing the degree of ownership which enabled him to execute his agreement, in one case by an Act of Parliament, in the other by a suit in Chancery. There was not, therefore, according to the settled practice of the court, a shadow of pretext for making the objection in question, in *Hoggart v. Scott*, and accordingly Sir J. Leach, M. R., over-ruled it.

So far, this is perfectly clear; but His Honour goes on to observe, that, "if the defendant had thought fit, he might have declined the contract as soon as he discovered that the plaintiffs had no title, and he was not bound to wait until they had acquired a title; but he, not having taken that course, it is enough that, at the hearing, a good title can be made." The proposition contained in this observation is, it is apprehended, altogether untenable and entirely at variance with the whole current of authority as traced in the preceding pages. It is submitted as a proposition clearly recognised in all the authorities, that a purchaser has no means of disaffirming his contract, however slender may be the vendor's ownership [*244] at the time of entering into it, if he can make a title before the Master's report; it being clear that defect of title cannot be made an objection at the hearing, and it being equally clear, according to the words of the order of reference, that, if at the time of the Master making his report, the vendor can make a good title, it is sufficient, and that in such case he is entitled to have the contract specifically performed.

In *Paton v. Rogers*,(z) the plaintiff was unable to make a good title before the master, in consequence of a dowress refusing to join. Sir J. Leach held "that if at the hearing, on further directions, the vendor was prepared to remove the objection to the title, which was reported by the Master, that he was in time to do so;" but he required an affidavit that the widow was ready to release and an undertaking to procure her to join in the conveyance.

In *Esdaile v. Stephenson*(a) the Master reported that a good title could be made if a widow would release her jointure, which was secured by a term. Exception for that the Master ought to have reported that the vendor could not make a good title. Sir J. Leach, V. C., stated that he had consulted with the Lord Chancellor upon this subject, with a view to settle a general rule, and that the Lord Chancellor concurred in

(z) 6 Madd. 257.

(a) 6 Madd. 366.

opinion with him,—that where a necessary party to the title was neither in law nor in equity, under the control of the vendor, but had an independent interest, unless there was *produced to the Master a legal or equitable obligation on the part of the stranger [*245] to join in the sale, the Master ought to report against the title; otherwise where a necessary party to the title was under the legal or equitable control of the vendor, as a mortgagee, there the Master might well report, that upon payment of the mortgage, a good title could be made.

According to what is stated by Sir J. Leach, in the report of *Esdaile v. Stephenson*, (b) Lord Eldon on a consultation with his Honour, for the purpose of settling the practice, concurred in the following rule, “that if the Master should report against the title, and at the hearing upon further directions the vendor had cured the defect, the court would then compel the purchaser to take the title, although it would not suspend the contract with a view to a future proceeding to perfect the title; that if the fact whether the vendor could at the hearing cure the defect were in question, it must be then sent back to the Master to review his report with the additional circumstances.”

In *Lechemere v. Brazier*, (c) Lord Eldon declared that he would not extend the practice of giving time to the vendor, to any case to which it had not already been applied, for it had in many instances been productive of great hardship. In that case a suit was instituted against the real and personal representatives (the heir-at-law being *an infant) of a party, who died intestate, and who was alleged to [*246] have been a trader; but this fact was not made out clearly by the evidence. At the hearing a decree was made, directing the usual accounts of the intestate's debts and personal estate, and ordering, among other things, the sale of his real estate. The estates were offered up for sale by the Master accordingly, and Mr. Lea became the purchaser, and the report of his being the purchaser was confirmed, and a motion was made that he should pay his purchase-money into court, which was successfully resisted, on the ground of the irregularity of the decree. The cause was afterwards re-heard without notice to the purchaser, and the decree altered by directing a reference to the Master to enquire, whether the intestate was a trader within the meaning of the bankrupt laws. The purchaser then moved to be discharged from his purchase, which was resisted on the ground, that if there had been error in the first decree it had been rectified, and that though the second decree did not declare the trading and direct a sale, yet a completed decree would be shortly obtained,—and also, that as it did not appear that a good title could not be made, the court would not so declare without a reference; and if a title was procured before the report, it would fall within the common rule. Admitting that the second decree was regular, there seems a good deal of force in this reasoning, and it would seem to be conclusive, unless it could be shown that the parties in *the cause had been guilty [*247] of *mala fides*, in not giving the purchaser notice of their intention to proceed to a re-hearing, which there seems no reason to impute, as the purchaser was not a party to the cause, and their only object being to place themselves in a situation to make a good title, there seems to have been no necessity for their giving the purchaser such notice. Lord

(b) 6 Madd. 366.

(c) 2 Jac. & Walk. 289.

Eldon was, however, of opinion that the form of the second decree was not regular, inasmuch as it directed a reference as to the fact of trading,^(d) and was also wrong in not reversing the first decree. The first of these objections, if resting on any solid foundation, afforded unquestionably a clear ground for discharging the purchaser, inasmuch as the fact of trading could not be established in the suit, and consequently the

[*248] vendors could not come in any subsequent stage of it, *and say they had then got a title. The case, therefore, was clearly out of all the authorities on the subject. To have held the purchaser to his contract would have been to carry the doctrine much beyond any of the preceding decisions, and would in fact have introduced an entire new line of cases. The former authorities established, that it was enough if at the hearing on further directions the vendor was ready with a good title; but this case would have established, that if the vendor, by a new suit, could make a title, this would do. Such a decision would clearly have been inconsistent with every principle of the administration of justice, and would have broken down every line of demarcation, by which these doctrines, already sufficiently extensive, have hitherto been hedged in.

The principle which appears to result from *Lechemere v. Brazier*, is this, that though a party will be allowed to perfect his title by such acts as can be effected in the course of the suit or concurrently with it, yet the vendor will not be allowed to institute a new suit for that purpose. Considered in this point of view, it affords no sanction to a recent decision, which, so far as it rests on any principle, is certainly inconsistent with former authorities. The case alluded to is *Coster v. Turnor*.^(e) There the estate was sold to Mr. C. under a decree, which at that time

[*249] was, as against one of the defendants, only a decree *nisi*. Mr. C. *was reported the purchaser, and the report was confirmed. In the course of investigating the title, it turned out, that no steps had been taken to make the decree absolute. On this ground a motion was made on the behalf of Mr. C., that he should be discharged from the purchase, which the Vice Chancellor ordered. Notice was immediately given of a motion to the Lord Chancellor to rescind this order, but before it could be brought on, steps had been taken to make the decree absolute. The Lord Chancellor, nevertheless, confirmed the Vice Chancellor's order, being of opinion "that he ought to decide the case as it stood, when the motion was originally brought before him. At that time," continued his Lordship, "the facts were precisely in the same state as they were when the case was heard before the Vice Chancellor. Now the purchaser having upon an application to the Vice Chancellor been once discharged from the contract, upon a ground which was then sufficient, and an application being almost immediately afterwards made

(d) "The form of the second decree is open to objection in directing a reference as to the fact of trading; it is also wrong in not reversing the first. The utmost that you can do in such a case as this where the heir-at-law is an infant, and it is not made out both in point of allegation and proof that the deceased was a trader, is to take a decree much in the same form as when the will is not proved, in which case you take a decree for an account of the personal estate, with liberty to exhibit interrogatories to prove the will; you cannot prove it on a reference. The court does not refer it to the Master to see, what is the effect of the evidence; but the declaration, that the will is well proved is made by the court itself upon reading the evidence; however, it is clear that the decree in its original form was wrong." (Per Lord Eldon, in *Lechemere v. Brazier*, 2 Jac. & Walk. 288.)

(e) 1 Russ. & Mylne, 311.

to me, and the position of things being such that I should have refused the motion if then made, it would not be just in consequence of that motion standing over, and the defect of the title having been repaired, if in point of fact it has been repaired, again to revive the contract, which had been rescinded by the Vice Chancellor."

In this case the plaintiff having been guilty of no misconduct, for no attempt was made to conceal the fact of the decree being only *nisi*, and nothing *appeared to show that it was more than a mere act [*250] of negligence, perfectly free from *mala fides*, the only [*250] question was whether he was to be allowed time to remedy this defect. It was argued for the purchaser that the decree *nisi*, directing a sale, could not be acted upon till it was made absolute; while it remained a decree *nisi*, it gave no authority to proceed to a sale, and *Lechemere v. Brazier* was much relied on as an analogous case. With respect to the former point, it may be observed, that if the court will allow time to get an Act of Parliament, *a fortiori* time might have been allowed to confirm the decree; and with respect to the alleged analogy, it is perfectly manifest that there was none at all, since in *Lechemere v. Brazier*, according to the doctrine laid down by Lord Eldon, a new suit would have been necessary before a title could be made, whereas, in the present case, it was only necessary to take another step in the cause, a step which is for the most part, a mere matter of form, and the result of which at all events would necessarily have been ascertained in a few days. It is therefore submitted, that the decision in *Coster v. Turnor*, is not according to the current of authority, nor within the principles on which the court on questions of this kind has been in the habit of acting.

In *Noel v. Hoy*, (f) a principle similar to that of *Lechemere v. Brazier*, was recognised. In that case the title of the vendor depended on the *construction of a will, under which he contended that [*251] the estate in question did not pass. At the hearing the court [*251] made a decree against him on this point, and then he asked for a reference to the Master to see if he could make a good title, insisting that the devisees were trustees for him, to which the purchaser objected. The reference was granted, the court saying, that it should have great difficulty, after a decree, in allowing the plaintiff to bring new parties before the court; but, as time had been allowed to get an Act of Parliament, the court thought itself bound to grant a reference. If the Master was of opinion that the devisees were trustees for the vendor, he would report in favour of the title; but if he was of opinion that a suit was necessary to try their rights, he would report against it.

The rule established by these authorities seems to be this, that if the vendor can before the decree on further directions complete the title, or show at the hearing on further directions that he is then in a situation to perfect it without the necessity of resorting to a new suit, the court will allow him to do so, and not let the purchaser off. So where the sale is under the decree of the court, in which case the question does not come on upon further directions, but upon a special motion subsequent to the Master's report, which would be analogous to the hearing on further directions; it seems in general, that although the Master have re-

ported against the title, yet if the vendor under the decree be in a situation to make it good before the purchaser brings on his motion [*252] to be discharged from the purchase, the court will refer it back to the Master to review his report.

In order, however, to entitle the vendor to this favour, his conduct must be characterised by perfect good faith, for if he have been guilty of any misrepresentation or concealment, as to the state of the title, or vexatious or needless delay in perfecting it, he will not be entitled to such indulgence; but in the case of a suit for specific performance his bill will be dismissed, and in the case of a sale under a decree of the court, the purchaser will be discharged from his purchase, notwithstanding the vendor may in the mean time have put himself in a situation to perfect, or even have actually perfected his title.

The latter branch of the proposition is illustrated by the recent case of *Dalby v. Pullen*.(g) There Sir Robert Wigram having been declared the purchaser of certain lots, it appeared on the abstract being delivered to him, that part of the property which he had bought was derived from J. C., and that it had been conveyed to him subsequently to the date of his will; so that it would not pass to Nicholas C., his devisee, under the trusts of whose will the sales in question were ordered by the court. Sir Robert Wigram, therefore, required proof that N. C. was the heir of J. C. Statements were made by the solicitor of the [*253] plaintiffs, which appeared to be satisfactory, and some other objections to the title having been removed, the report of Sir Robert being the purchaser was confirmed, and the purchase-money paid into court. Before any conveyance was executed, Sir Robert Wigram was informed, by persons who were not parties to the suit, that Nicholas C. was not the heir of J. C. Search was accordingly made, and it was soon ascertained that N. C. was not the heir-at-law, but that there was living an heir of an elder brother deceased, who now claimed to be entitled to the after-purchased lands. In this state of circumstances an order was made referring back the title to the Master; he reported against it and to his report exceptions were taken. Pending the exceptions, the heir-at-law executed a release and conveyance of all his interest. Shortly afterwards the exceptions were argued and overruled, and as soon as they were disposed of, two motions were made; one by the purchaser to be discharged from his purchase, and the other by the plaintiffs, that it might be referred back to the Master to review his report and inquire whether the vendors could now show a good title.

There were further affidavits, the effect of which, on the whole, went to show that the plaintiff's solicitor had been guilty of some degree of concealment of his knowledge as to the heir-at-law of John Carter and on these affidavits the Vice-Chancellor granted Sir R. Wigram's motion, and refused the other with costs.(h) From this order [*254] there was an appeal to the Lord Chancellor. There were two questions; first, whether all the parties to the suit were to be bound by the conduct of Mr. Street, the plaintiff's solicitor; and Lord Lyndhurst was clearly of opinion "that with reference to the purchase

(g) 1 Russ. & Mylne, 396, on appeal from an order of the Vice-Chancellor, 3 Sim. 29, which was confirmed.

(h) 3 Sim. 29.

and sale, he must be considered to be acting for all the parties in the cause," and that to decide that he was not, and on such a ground to hold the purchaser to his contract, might lead to the greatest hardship and injustice as respected the purchaser; and the court being of opinion upon the affidavits that Mr. Street had discovered that Mr. Nicholas was not the heir-at-law during the discussion as to the title, proceeded thus: "Now, Mr. Street having represented in the first instance that Nicholas Carter was the heir-at-law of his brother John, and having during the progress of the discussion on the other points, discovered that in that respect he was mistaken, and that another person was the heir-at-law, it was his duty, in fair and honest dealing, to have communicated that circumstance to the purchaser; and he not having communicated that circumstance to the purchaser, and the purchaser having, after the other objections to the title had been cleared up, discovered it by accident in consequence of a communication from another quarter, and this court having determined upon *exceptions to the master's report, that it constituted a good objection to the title; [*255] it appears to me quite impossible, that the parties in this suit, if they are bound by the acts of Mr. Street, have any equity to come into this court to say that a further reference should be directed to the master for the purpose of ascertaining whether a good title can or not be now shown; for it is quite obvious that if this discovery had not been made, the vendors would have forced the purchasers to have taken the title such as it was, knowing that defect to have existed in it, which has since been discovered. Under these circumstances it is quite impossible that the purchaser can be held to his contract; the application made on the part of the vendors must be dismissed with costs."

SECTION VII.

Of Exceptions to the Master's Report.

If either party be dissatisfied with the Master's report on the title, he brings his objections to it before the court in the shape of exceptions, when the points in dispute are fully argued and settled.

If upon argument of an exception the court should be against the title, the vendor should obtain an order that the exception may stand over; as otherwise, it would appear upon record that a *good title [*256] could not be made.⁽ⁱ⁾ The court, however, will not always permit this; especially where the vendor's conduct has been vexatious, or even dilatory only: thus, in a recent case of *Andrew v. Andrew*,^(k) Sir J. Leach allowed the exception, refusing to permit it to stand over, to give the vendor an opportunity of remedying the defect, notwithstanding very urgent application on the part of the vendor's counsel, who stated that it was the universal practice not to allow the exception but to permit it to stand over. His Honour expressing great surprise that counsel should make such an assertion, said that he had known it done very frequently. In that case, however, it ought to be observed, that the vendor's conduct had not been such as to entitle him

(i) *Cooper v. Denne*, 1 Ves. Jun. 567.

(k) *Rolls*, 7th July, 1831. MS.

to indulgence; the exception, according to the statement of the purchaser's counsel having been allowed to stand over once or twice before, to give him an opportunity of getting certain parties to join in suffering a recovery, which would have cured the defect in the title, but which he had not done.

It is competent to the purchaser, at any time before the decree on further directions, to have the report (notwithstanding it may have been absolutely confirmed) referred back to the master to review it, on the discovery of a new fact affecting the validity of the title. Thus in *Jeud-* [*257] *wine v. Alcock*,⁽¹⁾ the Master *having reported in favour of the title, and no exceptions being taken, the report was absolutely confirmed. Afterwards another Master, in a different proceeding, made a report by which the title was affected; whereupon the defendants presented a petition, supported by an affidavit of the fact, that they were ignorant of the second set of proceedings, till after the Master's report was confirmed, praying a reference back to the Master as to the title, to review his report, which was ordered accordingly.

If exceptions be taken to the Master's report that a good title can be made and are over-ruled, other objections to the title cannot be made; but if the exceptions be allowed, and the report sent back to the Master to review it, and new abstracts be delivered,^(m) further objections may be brought in, arising, either out of the new abstracts which appears to be perfectly reasonable, or out of the abstracts delivered previously to the Master's report, the propriety of which is not so obvious, because it may be said, that the parties, having had full opportunity already of examining the abstract, have precluded themselves from further objecting to it. This, however, is not so, as has been already observed, and the practice was so settled in *Fildes v. Hooker*. This was a suit to enforce the specific performance of an agreement to grant a lease for 21 years, of a house in Crescent Place, near Tavistock Square. The abstract referred only to a lease for 99 years, dated July 21st, 1809, from [*258] the Skinner's Company *to Burton, an under lease from Burton to Kerry, dated 29th September, 1809, and a lease from Kerry to the plaintiff, dated 29th November, 1810, for 95 years and three quarters, wanting ten days. The Master reported that the plaintiff could make a good title to a lease for 21 years, according to the agreement; to this report the general exception was taken, "that the Master ought to have reported, that the plaintiff could not make a good title." The question raised upon this exception was—"whether in the absence of express stipulation to the contrary, the vendor of a leasehold interest is bound to produce the title of the lessor?" Sir W. Grant, without deciding the general question, but,—taking the obvious distinction between the power of the court to compel the vendor to produce his lessor's title, and the propriety of its assisting him without such production,—was of opinion, at all events, that if the vendor would not produce his lessor's title, equity ought not to assist him in forcing his agreement on the purchaser; because to say that the purchaser must be content with the title, which had been produced, "would be to say in other words, that he has no right to require any title whatever," and

(1) 1 Madd. 597. And see *Dalby v. Pullen*, 1 Russ. & Mylne, 298.

(m) *Brooke v. —*, 4 Madd. 212.

therefore allowed the exception; but as the Master by approving of the title, had rendered it unnecessary for the plaintiff to go further and produce, if that were in his power, the title of the ground-landlord, his Honour thought that he should have an opportunity of so doing, and accordingly allowed the exception, but directed the report to be sent back to the Master to *review it.⁽ⁿ⁾ When the case went back to the Master, a new ground was taken, and it was ob- [*259] jected that the premises were, by former leases, made subject to covenants for rents and otherwise, to which it was alleged the premises still remained liable; upon which the Master reported that he was of opinion, "that, upon the plaintiff indemnifying the defendant against the performance of any covenant, which may have been entered into, by the plaintiff or any former lessees of the premises, for payment of any rents or otherwise, in respect of the premises, the plaintiff can make a good title to the premises, upon a lease for the term of 21 years, according to the agreement." The report was again excepted to, and Sir J. Leach allowed the exception. His Honour said, "it appears, that the house in question is one of the six houses built on ground demised by the Skinner's Company to Mr. Burton, for a term of 99 years, from Michaelmas, 1807, at a ground rent of £10, and in that lease is contained a proviso for re-entry, upon non-performance of any of the covenants contained in it. The plaintiff is now in possession by an assignment of an underlease, granted by Mr. Burton, of that particular house. This underlease contains all the covenants which are included in [*260] the *original lease; but it is obvious that the observance of these covenants by the holder of this underlease cannot alone protect his possession. If this defendant were to accept the lease, contracted for, from the plaintiff, and the covenants in the original lease, though well observed with respect to this particular house, were to be broken as to any other of the five houses, the Skinners' Company would be entitled to re-enter, not only on that particular house, but upon the whole property comprised in the original lease, and consequently on the premises in question. The plaintiff is necessarily, therefore, driven to admit, that he cannot give to the defendant a secure lease for the term of his contract."^(o)

On a sale by auction or private contract, the sale is complete when the articles are signed; but on a sale by the Master, the purchaser is not entitled to the benefit of his contract till the report of his being the purchaser has been absolutely confirmed,—a rule founded clearly on the nature of the transaction; for the Master's report is merely to the effect, that a certain person is the best bidder, and therefore can amount to nothing till the court has accepted this bidding, which it does by confirming the report. Until the report has been confirmed, the transaction is

(n) 2 Mer. 424; "it is the course of the court, where the Master has, by expressing an opinion in favour of the title, prevented the vendor from showing, that if his opinion had been otherwise, still the title was good, to send it back to the Master to review his report, the party moving paying the costs of the motion." (Per Sir L. Shadwell, V. C., in *Egerton v. Jones*, 3 Sim. 392; *Andrew v. Andrew*, *ibid.* 390;) *Egerton v. Jones*, 1 Russ. & M. 694; *Portman v. Mills*, *Id.* 696.

(o) *Fildes v. Hooker*, 3 Madd. 193.

nothing more than a proposal by one side, which may be approved or rejected by the other. Not therefore, till the court has acquiesced in this proposal, is there any contract. Not therefore, till the [*261] *report has been confirmed, is the property changed in equity. The confirmation of the report has all the effect of signing a written agreement between private persons; and there seems to be no principle, or any authority, for contending, that it has any other or different effect from a contract in writing and signed. Attending to these considerations, the doctrines of equity on the subject will be perfectly clear and intelligible. (p)

[*262] *Hence, if the property have been injured or destroyed by fire in the interval, before the confirmation of the report, the loss falls on the vendor. (q) Hence, also, a purchaser being served with a notice to open the biddings cannot proceed to confirm the report absolutely, the notice being tantamount to a declaration that the bidder's proposal has not been accepted, and that the contract is at an end. (r) Nor can the court, until the report has been confirmed, pro-

[*263] ceed summarily against the purchaser; (s) to *found this jurisdiction, the contract must first be made complete; the vendor may then proceed to obtain an order that the purchaser shall pay in his purchase-money, and be let into possession from a given day;

(p) This seems to concur with the view taken of this subject by Lord Eldon in *ex parte Minor*, (11 Ves. 561,) which was a petition by the purchaser to have the value of certain premises, destroyed by fire before the confirmation, ascertained, and the amount deducted from the purchase-money: the only question upon this was, as to the time when there was a complete contract, for until then the property was not changed. Lord Eldon observed, "what is the date and time of the contract, at which it can be said to have been complete? Is the bidding in the Master's office the contract between the court and the bidder, or only an authority to the Master to tell the court, that if the court approves, the court may make a contract with him upon the terms proposed? Let the Master certify to me what were the conditions of sale, and what has been the deterioration in value by the fire, and reserve the question; for though the sum is not large, the question is one of the most considerable that has occurred for some time. In some of the cases that have been cited, the change of property is said to be from the date of the report; in others from the time of the conveyance; so that, though confirmed as the best purchaser, if he had not got the conveyance, he would have been entitled to say the estate was not his. That cannot be according to the principle. Suppose this person had insured the premises, while in the Master's office, from fire, would he, according to the cases in late times have had an insurable interest? His interest is not near so thin as many, that have been considered insurable;" and he accordingly on taking time to consider, declared in conformity with the tenor of the preceding observations, that the loss occasioned by the fire must fall upon the vendor, and made the order accordingly with costs. (See *post*, p. 265, 266, from which it would seem that Lord Eldon afterwards entirely forgot the doctrines he has here stated.) A similar view seems to result from the judgment of Lord Hardwicke, in *Mackrell v. Hunt* (2 Madd. 34, n.) where his Lordship observes, "a purchaser under the decree of the court is not considered to be the owner, and consequently not entitled to the rents and profits of the estate, till after the time for paying the money into the bank. The bidding is general, and though the report may be confirmed, yet the purchase is not completed till the title is accepted and the money brought into court; for, till then, objections to the title may avoid the bidding, though it seems to be otherwise, when, upon the reports being confirmed, the purchaser comes into court, and, to accelerate the purchase, declares he is satisfied with the title, and brings in the purchase-money."

(q) *Ex parte Minor*, 11 Ves. 559; and see *Twigg v. Fifield*, 13 Ves. 517.

(r) *Vansittart v. Collier*, 2 Sim. & Stu. 608.

(s) *Anon.* 2 Ves. Jun. 335. In this case the report had been confirmed *nisi*; on the motion, that the person reported purchaser should complete his purchase and pay in his money by a given day, Lord Loughborough said, "he felt a difficulty, as until confirmation the purchaser is always liable to have the biddings opened, until that *non constat* that he is a purchaser."

and upon the expiration of the time fixed, a short order may be obtained that the purchaser shall pay in his money, or stand committed.^(t) Hence also, if a purchase, under a decree, be not confirmed absolutely in the lifetime of the purchaser, and his executors refuse to pay the purchase-money, they cannot be compelled, because there is no complete contract. And therefore where A purchased an estate for B, in pursuance of a previously expressed wish to possess the property in question, but without any direct authority, and B died without adopting the purchase, but the order *nisi* to confirm was obtained, the court refused to order B's executors to pay the purchase-money, and the heir declining the purchase, the order *nisi* was discharged, and a re-sale directed.^(u)

If the purchaser have confirmed *nisi*, and afterwards refuse or neglect to confirm absolutely, the vendor may confirm the order.^(v) If the purchaser take no step to confirm *nisi*, the vendor may do so for him.^(w)

On a purchase under a decree of the court, where there is no stipulation to the contrary, the general rule is, that the purchaser shall be let into possession *from the quarter-day preceding his purchase; paying his money before the following one.^(x) This [*264] rule evidently proceeds upon some notion, that the rents are payable quarterly, and that the portion of the quarter, which may have elapsed, is not of sufficient consequence to be noticed. In strictness, and by analogy to the rule upon ordinary contracts, between party and party, the purchaser ought to pay interest upon his purchase-money for so much of the quarter as had elapsed in order to be entitled to the whole rents of the current quarter. The rule, however, is settled as above stated.

If the nature of the property be such, that the rents and profits are yielded oftener than once a quarter,—every month or every week, for instance, as in the case of collieries or mining property,—the spirit of the above rule manifestly suggests, that the money being paid in the interval between two successive settlements of account, whether made quarterly, monthly, or weekly, the purchaser shall be entitled to the next payment of rents and profits. This is accordingly the actual practice, and, in the cases upon the subject, is explained by saying that a colliery, being in the nature of a trading concern, is to be governed by peculiar rules, and that, not being like an ordinary purchase of land, the purchaser is not to be entitled to call for the rents from the preceding quarter-day,—a refinement which will appear to be quite beside the question, if the reasoning above-stated be considered to be founded on plain and obvious considerations.

*The mere fact of a purchaser having had his money [*265] ready and lying by, will furnish no reason, which can entitle him to the rents and profits farther back than the preceding quarter-day; it being his own fault, that he kept the money by him and unprofitable, and it would be very hard that the vendor should suffer by his neglect; and besides, he might have moved the court for leave to pay in his money without prejudice to any question as to the title.^(y)

(t) *Lansdown v. Elderton*, 14 Ves. 312.

(u) *Lord v. Lord*, 1 Sim. 503.

(v) *Chillingworth v. Chillingworth*, 1 Sim. 291.

(w) *Lord v. Lord*, 1 Sim. 503.

(x) *Wren v. Kirton*, 8 Ves. 504.

(y) *Barker v. Harper*, Coop. 32.

There is an important decision on this subject, which it is not easy to reconcile with the preceding course of observation. It occurs in the case of *Anson v. Towgood*,^(z) which arose on the sale of the life-interest of a party in two sums of £36,600 three *per cent.* consols, and £36,300 three *per cent.* reduced annuities. The sale took place on the 4th July, the dividends on the consols became due the day after the sale; the report of the purchase was made on the 8th July; this was afterwards confirmed and the purchaser paid in his money. A question then arose whether the purchaser was entitled to the dividends that became due on the 5th, that is after the bidding, but before the confirmation of the report. Lord Eldon held that he was entitled to them, saying, "The rule of the court, in the purchase of a fee simple estate, is to give the profits from the quarter-day preceding the payment of the purchase-money; but is that so where a man buys a life estate, which may not last five minutes? It would be difficult to state any difference between the dividends on the [*266] consols, which *became due the next day, and those on the reduced which were not to be payable till three months after. Can any thing turn upon the report not being confirmed? There was a case about a house being burnt down before the confirmation of the report. If the tenant for life had died the same night, must not the purchase-money have been paid? The report, I think, when confirmed, must have relation back to the purchase, and the contract, I apprehend, was made the moment that the purchaser's name was entered in the Master's book. If the purchaser had lived till the 6th July, and then died, he would have had nothing if he was not entitled to those dividends."

It seems difficult to support this decision on any sound principle. If there be no complete contract till the confirmation of the report, how, in the absence of any special agreement, can the purchaser be entitled to the fruits of the purchase, that fall previously to that period? The subject matter of sale does not become the purchaser's, even in equity, till there is a complete contract; and there is no complete contract, till the report has been confirmed. If, as Lord Eldon argues, the report when confirmed has reference back to the day of sale, then those decisions, which have held that the vendor is liable for loss or deterioration happening between the day of sale and the confirming of the report, must be [*267] erroneous;^(a) for it cannot be contended **uno flatu* that the purchaser shall be exempt from losses, but shall enjoy the fruits which accrue within this period. Equally inexplicable does this decision appear to be upon the footing of the rule with respect to land; because applying that rule by analogy, it would come to this, that the purchaser paying his money between two successive payments of dividends, would be entitled to the profits from the preceding payment of dividends, (that is to say;) to the payment of dividends accruing next after the payment of the purchase-money,—a rule, which it is plain would not have given the purchaser in this case the dividends he petitioned for, since these were dividends which had accrued before the payment of his money.

(z) 1 Jac. & Walk. 637.

(a) See *ex parte Minor*, n. (p) ante p. 261, where Lord Eldon seems to have thought that something "turned upon the report being confirmed."

Where the biddings are opened, the order is made at the expense of the party opening them, who must immediately pay in his advance, and the costs of the first purchaser; and it seems also, that where part of the purchase-money has laid dead, and that fact is found by the Master, interest at the rate of 4 *per cent.* must also be paid on this.(b)

The court will not, upon opening the biddings, dispense with the deposit, that being the only hold which it has on the purchaser.(c) Neither will the *court discharge one purchaser and substitute another without the latter paying in the purchase-money, Lord [*268] Eldon on a motion of this kind, saying that "the effect would be discharging a purchaser, who had made a deposit for one, who might be worth nothing; but he should be discharged whenever the new purchaser paid in the money."(d) Nor will the purchaser be changed on paying in the money, without an affidavit that there is no under-bargain, as "this might be an ingenious device with a view not to come to the court to open the biddings;" and therefore there must be an affidavit that there is no under-bargain, "for otherwise the new purchaser might give the other a sum of money to stand in his place, and so deceive the court."(e)

A person opening the biddings whereby the estate is re-sold at a considerable advance, though not himself the purchaser, is not entitled to his costs incurred by getting the order of re-sale, and paying in the deposit, the biddings being re-opened not for his benefit but that of the estate, "and the costs being in the nature of a premium paid by him for the opportunity of bidding."(f)

*The circumstance of the party, who applies to open the biddings, having been present at the sale, is not in itself a [*269] conclusive objection to his application.(g) Whether, said Lord Eldon on such an application, the biddings shall be opened,—and opened on the application of a person who was present at the sale and did not bid, is a question of circumstances. If the court declines to open the biddings, its refusal is not for the sake of the first purchaser; if the biddings are opened, it is not for the sake of the party making the application, that the resale is ordered.(h) But, though the fact of having been present at the sale is not a conclusive objection, yet it is a circumstance which the court looks upon with jealousy; and the way in which that jealousy has been exercised, has been sometimes by imposing harder terms, as in *Rigby v. M'Namara*(i) where the order was made on paying half the purchase-money and all the costs and expenses of the purchaser;

(b) This was directed on opening the biddings for Gen. Birch's estate. Sir Ed. Sugden's *Vend. & Purch.* p. 60, 8th ed.

(c) *Anon.* 6 Ves. 512. This rule is well illustrated by an anecdote mentioned by Lord Eldon in this case. "I recollect when the manor of Great Thurlow, in Norfolk, was sold while Lord Thurlow was Chancellor, on whose behalf I moved to open the biddings before Sir Thomas Sewell upon an advance of from 5,700*l.* to 6,700*l.* The Master of the Rolls replied, not knowing the circumstance, that if the Lord Chancellor was the bidder he should make a large deposit, the deposit being the only hold the court has on a purchaser, and ordered a deposit of the whole advance."

(d) *Rigby v. M'Namara*, 6 Ves. 515.

(e) Per Lord Eldon in *Rigby v. M'Namara*, 6 Ves. 515; *S. P. Vale v. Davenport*, *ib.* 614.

(f) *Rigby v. M'Namara*, 6 Ves. 466.

(g) *Thornhill v. Thornhill*, 2 Jac. & Walk. 348.

(h) *Lefroy v. Lefroy*, 2 Russ. 606.

(i) 6 Ves. 117: and see *Preston v. Barker*, 16 Ves. 140, where the order was made "on the terms of paying all the costs."

and sometimes by expecting a larger offer to be made under the idea of having a compensation by the largeness of that offer for any loss that may have arisen from the want of competition at the sale.^(k)

[*270] The practice of opening the biddings has always *been disapproved. The great objection to it is, that it induces parties to lay by on the speculation of making a better bargain. Sir J. Leach attempted to put the practice down in *M'Culloch v. Cotbatch*; ^(l) he refused to open the biddings, the party applying having been present at the sale with a view to the general benefit of sales by the court: "I think," said His Honour, "it ought not to be permitted to a person present at the sale, to open the biddings. If such persons were allowed to open the biddings, the sales by the court would not have the full benefit of the spirit of competition."

It appears from what was said in *Thornhill v. Thornhill*,^(m) that this decision was followed by his Honour in subsequent cases; but Lord Eldon, in that case very properly refused to adopt it, saying in effect, that this was not the way to alter a practice, which had been long settled. "The practice," said his Lordship, admitting that the rule which was intended to protect, had frequently been very pernicious to the interests of the suitor, and that their estates had sometimes sold for next to nothing, in consequence of it, "cannot be altered by one judge; it may perhaps with reference to future cases be necessary to consider the subject with the assistance of the Master of the Rolls and the Vice Chancellor."⁽ⁿ⁾

[*271] When the property, which is the subject of sale, *is in the nature of a trade, although *prima facie* it has the aspect of realty, the ordinary rules of the court, as to opening biddings, do not apply. It is, indeed, nowhere expressly decided, that the biddings in such a case may not be opened, but the circumstances which would induce the court to do so must be very special; and it is rather to be inferred, that the court would require, that the proposed bidding should be paid into court, there to remain *as a pledge* that the next purchaser shall perform his contract; the *mere deposit* even of the whole money being, as is remarked by Lord Eldon, in *Williams v. Attenborough*,^(o) no security from the possibility of a loss; "because if there is one person who bids more, the party opening the biddings will be discharged, and his deposit can never be made a security for such subsequent bidder." This case arose on the sale of a colliery, and upon the affidavits it was doubtful whether the party proposing to open the biddings was a *bond fide* bidder. Lord Eldon, after observing that the question was not, Whether the person applying was a *bond fide* bidder, but whether regard being had to the nature of the property, the circumstances of the case and the general interest of the suitors of the court,—not the interest of the purchasers in the Master's office,—so much advantage is held out as to induce the court to open the biddings? proceeded thus: "I say, having regard to the nature of the property. Collieries and landed estates are quite different

(k) *Tyndale v. Warre*, Jac. 525, where the biddings were opened on an advance of 600*l.* upon 3800*l.*

(l) 3 Madd. 314.

(m) 2 Jac. & Walk. 347.

(n) *Ibid* 348; and see *Tyndale v. Warre*, Jac. 526; where his Lordship repeats this observation in nearly the same words.

(o) *Turn*. 70.

in the contemplation of this court; a colliery being always *considered as a trade, the profits accruing from day to day, [*272] as in all trading concerns. There are decisions of Lord Hardwicke to that effect, where he held that a bill would lie for an account of the profits of a colliery, although for an account of the rents and profits of real estate no bill could be maintained. With reference to opening the biddings, the nature of the property forms a very material consideration. Land, generally speaking, keeps pretty nearly to the same value, although there may indeed be accidental changes in the value of land from temporary causes; but collieries are liable not only to fluctuations in value, but to destruction; they are like land in a country liable to earthquakes. The case of *Wren v. Kirton* is a remarkable illustration of the principle, which ought to govern the re-sale of collieries. (p) Such is the species of this property, that it is almost impossible for the court to model the security, to be given by the person applying to open the biddings, in such a way as to avoid the possibility of loss; a deposit of £10 or £20 *per cent.* cannot be sufficient, for in many cases it will evidently be better to forfeit the deposit, than to take the property. Again, upon a re-sale of the property, the purchaser may be tired of his bargain before he has completed his purchase; and although it is true that the court may *compel the final bidder to pay the money, the process [*273] is such, that in a great many cases it is more for the interest of the vendors to abandon the bargain, than to put in force the process of the court. The property is liable to such variations in value in very short intervals; the blasting of a mine or any other accident, even a change in the markets, or to take an instance at the present moment, the stoppage of a navigation by frost, may make such a difference in the course of a week, that in all these cases it is the duty of the court to consider, not what the particular interest of the suitors in any particular cause would require for their advantage, but what the general principle ought to be with reference to the general benefit of the general suitors of the court." From these considerations his Lordship was of opinion that where the subject of sale is a colliery, a trade of so very hazardous a nature in which there is always such a vast deal of speculation, the court could not apply the same rules, which are applied to purchases of landed estates.

Previous to the confirmation of the report, as has been already stated, it is competent for the court to open the biddings as a matter of course upon a sufficient advance being offered; but after the report has been confirmed, that is to say, after there is a subsisting agreement, mere advance of price is not a sufficient ground for opening the biddings, for exactly the same reason that mere inadequacy of price *is [*274] not a ground for setting aside an ordinary contract of sale between private individuals. The same circumstances, however, which would induce the court to set aside a contract (q) will induce it to open the biddings. This seems at least to be the true principle, though perhaps

(p) Upon a former sale before the Master, the sum of 23,000*l.* had been offered by a person bidding *bona fide*. That sale was defeated by setting up a fictitious bidder. Afterwards the lot was again put up three times. On the two first occasions, no more was offered than 12,000*l.* and 6,000*l.* The estate was ultimately sold for 16,000*l.*

(q) See *ante* p. 178 *et seq.*

it has not in all cases been rigidly adhered to, probably from a want of advertence to the true principle, rather than from any intention to depart from it.^(r) Hence as fraud is the only ground on which a contract as between private persons can be set aside, fraud is the only ground on [*275] which the court *can order the biddings to be opened after the report has been confirmed. Accordingly in *Morice v. the Bishop of Durham*,^(s) Lord Eldon lays it down that "the only case in which the biddings can be opened after confirmation of the report is, where there is some fraud or misconduct in the purchaser, or fraudulent negligence in another person, as the agent, of which it is against conscience that the purchaser should take advantage." The latter part of which rule he afterwards expressed as follows:—"My opinion is, that after a purchaser has confirmed his report, unless some particular principle arises out of his character as connected with the ownership of the estate, or some trust or confidence in his own conduct in obtaining his report, the bidding ought not to be opened. In this particular case I lament it; but there is much less mischief in abiding by the rule, than in permitting myself to depart from it upon what are called special circumstances, not connected with this view of the case."

[*276] As in ordinary cases, even where the parties in the *cause are few, the expense of opening biddings is from £20 to £25, (which is occasioned by advertisements in the Gazette and other papers, fresh particulars of sale, the sale, and the costs of the motion,) the court will not open them for an advance of less than £40.^(t) Hence in a re-

(r) In *Watson v. Birch*, (2 Ves. 51) the biddings were opened merely on the circumstances of the case, which were hard, but there was no fraud. The foundation of the application was an overbidding of above 4000*l.* and that the defendant (who was the owner of the estate,) was in the Fleet prison at the time of the confirmation of the report, and was told by two persons, that they would direct their agents to open the biddings, which they neglected to do. This is one of the decisions adverted to in the text, as departing from the true principle, and was much disapproved of by Lord Eldon, in *Morice v. the Bishop of Durham*, (11 Ves. 57.) who said he would not have made the orders in this, and a case of *Gower v. Gower*, there cited. In *Chetham v. Grugeon*, (5 Ves. 86,) the biddings were opened simply on the ground of an advance of 60*l.*, the purchase-money being 300*l.*, although the report had been absolutely confirmed,—a decision of Lord Loughborough's, which was clearly wrong. With respect to *Gower v. Gower*, Lord Eldon in another case, (*White v. Wilson*, 14 Ves. 153) said, "my opinion founded upon what I had repeatedly heard stated by Lord Thurlow, who formed this rule upon the great case in Lord Gower's family, was that after confirmation of the report, unless there is some misconduct on the part of the individual, who has the benefit of that confirmation, the court will not open biddings upon negligence, surprise, or circumstances of that kind, and that it is much better for the suitors that it should be distinctly understood that a report confirmed, cannot be shaken unless upon such circumstances as were contained in that case; the party who confirmed the report, being the steward of the family, and knowing more as to the circumstances of the estate than he communicated. That was a case of surprise generated by his own conduct, which Lord Thurlow thought gave a right to open the biddings in that instance; but if the purchaser's conduct is fair, there never would be an end of opening biddings after confirmation of the report."

(s) 11 Ves. 57.

(t) *Farlow v. Weildon*, 4 Madd. 460. At one period a rule prevailed, entitling a party to open the biddings upon an advance of ten per cent.; but that rule has been abolished (*Andrews v. Emerson*, 7 Ves. 420;) and the court acts according to the exigencies of the case. Thus, in *Upton v. Lord Ferrers* (4 Ves. 700,) the biddings were opened on an advance of £50 upon a bidding of £380, the court refusing to do so on an advance of £40. In *Tait v. Lord Northwick* the biddings were opened upon an advance £200 upon £2,360.

Where the suit is instituted on the behalf of creditors or infants, it should seem that the biddings will be opened on a smaller advance than in other suits. Thus, in *Brooks v. Snaith*, (3 Ves. and Bea. 144,) they were opened upon an advance of £500 upon £10,000, which is only 5 per cent. But even in such suits the court will not open the biddings upon so low a

cent case on a motion to open the biddings as to two lots, the advance upon one being £70 and upon the other £30, the court refused to make the order as to the second lot, but recommended the party moving to give a new notice of the motion, that the biddings for the two lots might be opened, and that a re-sale might take *place in one lot [*277] upon an advance of £100 on the two lots, as this would remove the difficulty of the small advance upon the second lot.”(u)

In *Watts v. Martin*,(v) on a motion that an estate which had been sold before the Master in separate lots, might be put up for re-sale in one lot, a considerable advance having been offered, the residuary legatee and the trustee consented. Mr. Mitford, for the former purchasers opposed the motion alledging the injustice upon them, after having incurred *expenses in surveys, &c.*; arguing, that in general cases the biddings were opened because some person might still bid higher, *whereas here* they are precluded if the whole should go in one lot: and that if this had been done at first, none of those individual bidders would have offered *or expended their time or money in surveys, &c.* The Solicitor General, (Sir John Scott,) said there had been a precedent twelve years before. The Court allowed the hardship of the case, but observed that as the residuary legatee and the trustee consented, they could not refuse the motion as the former purchasers might claim, and be satisfied, the expenses they had sustained in consequence of the former sale before the Master. The court directed the party thus applying “to pay the costs, charges, and expenses occasioned by the said biddings, to be settled by the Master in case the parties differed.”

Where the contract is clearly inequitable, the *court will [*278] sometimes release the purchaser on forfeiting his deposit. One of the earliest cases in which this was done, was in *Savile v. Savile*,(w) on the ground of great excess of price. The point first came before Lord Nottingham, who made some strong observations, and thought that the purchaser ought not to be let off; but before the case was disposed of, Lord Macclesfield became Chancellor. His Lordship “took notice that more had been urged by the Lord Nottingham than he had ever heard on the subject; that according to his apprehension, a court of equity ought to take notice under what a general delusion the nation was at the time when the contract was made by Mr. Frederick, when there was thought to be more money in the nation than there really was, which induced people to put imaginary values on estates: that as upon a contract betwixt party and party, the contractor would not be decreed to pay an unreasonable price for an estate, so neither ought the court to be partial to itself, and do more upon a contract made with itself, or carry that farther than it would a contract betwixt party and party. On the other hand the court might be said to have rather a greater power over a contract made with itself than with any other.” The purchaser was accordingly released on forfeiting his deposit, which was £1,000, on a bidding of

per centage, unless it produce £500; for in *Garstone v. Gladstone* (1 Sim. and Sta. 20.) the court refused to open the biddings upon an advance of £350 upon 5,300, saying, “that it did not confine itself to a particular rate per cent. although 10 per cent. was a sort of general rule. The cases cited establish that, where an advance of £500 is offered, the court will act upon it, though it be less than 10 per cent., but in this case only £350 is offered.”

(u) *Brookfield v. Bradley*, 1 Sim. and Sta. 23.

(v) 4 Bro. C. C. 113, 5th ed.

(w) 1 P. W. 745.

£10,000; although it can hardly be doubted that Lord Nottingham's would have been the better decision. In order, however, to entitle the purchaser to this indulgence, the inequality *of price must [*179] be very great; and perhaps at the present day mere excess of price would not be held to be a sufficient ground, unless connected with circumstances of mistake, or such as afforded a presumption of fraud; and accordingly, on a recent application to the court by the persons, who opened the biddings for General Birch's estate to forfeit their deposit, which was resisted by the creditors, for whose benefit the estate was sold, the court held the purchasers to their bargain, and would not permit them to rescind the contract, although they had given a price, which was considered much beyond the value of the estate.(x)

In *Morshead v. Frederick*,(y) the contract was rescinded on the ground of mistake; the purchaser bought under a misapprehension that the premises were subject only to a ground-rent of £56 a year, they being in fact subject also to a rent of £210, payable to other parties. The price had been ascertained by the valuation of a broker. The purchasers were Smith Payne and Smith, the bankers, who were in possession, and who it appeared on the affidavits, had *actually paid both rents* for many years to the parties entitled to them. Lord Eldon, before whom the point came in the first instance, expressed an opinion in favour of the purchaser's right to rescind the contract, but did not decide the point, the order being made by Lord Erskine on the ground of mistake. His [*280] *Lordship thought "the circumstance of both rents being paid by the purchasers immaterial, as it appeared that they had not communicated that circumstance to the broker, and the magnitude of their concerns might easily account for the omission!" A singular reason for the decision; although, as it appears that Lord Eldon thought the contract ought to be rescinded, it is probable that the decree might have been well supported on other grounds.

The solicitor in the cause buying in the estate to prevent a sale at an under-value, will be held to the purchase, if he acted without authority.(z) The same principle has been applied to the assignees of a bankrupt buying in an estate sold by the court on the petition of the mortgagee.(a) On similar grounds a man, who had opened the biddings in the name of a person who had no existence, was himself decreed to be the purchaser.(b)

Where an estate is sold in lots, and the biddings are opened as to some of the lots, if the purchaser of them had also purchased a subsequent lot, he will be discharged from it, on an affidavit that he had bid for it in consequence of having been declared the best bidder of the prior lot, the bidding upon which had been opened,—it being reasonable that the purchaser should have the option of retiring from the subsequent lot.(c)

[*281] *A purchaser under a decree, by the act of purchase, submits himself to the jurisdiction of the court as to all matters connected with that character; and therefore if he commit waste, the court

(x) Sir Edward Sugden's Vend. and Purch. 8th ed. p. 65.

(y) Sir Edward Sugden's Vend. and Purch., App. No. 10, 8th ed.

(z) *Nelthorpe v. Pennyman*, 14 Ves. 517.

(a) *Ex parte Tomkins*, Ch. 28d Aug. 1816, Sir Edward Sugden's Vend. and Purch. 8th ed., App. No. 11.

(b) *Molesworth v. Opie*, 1 Dick. 289.

(c) *Price v. Price*, 1 Sim. and Sta. 386.

will grant an injunction to restrain him, although he is not a party to the cause.(d) So, on the other hand, where a purchaser comes voluntarily in under a decree, and consents to a reference, he does not waive any right to which he would be entitled on a bill against him for specific performance. Thus, where a person having contracted for the purchase of an estate from a devisee in trust to sell for the payment of debts and legacies, and a suit being afterwards instituted for the administration of the assets, in which it was (among other things) referred to the Master to inquire, whether the devisee in trust had entered into any contracts for the sale of any part of the testator's real estate, and if so, whether it would be for the benefit of the parties, that those contracts should be carried into effect, and the Master having reported in the affirmative on both points,—on the confirmation of the report, it was ordered that the purchaser objected to the title to the estate, *but consenting to go before the Master upon such title*, it should be referred to the Master to see if a good title could be made thereto. The Master reported in favour of the title; upon which the plaintiff presented the usual petition for payment of the purchase-money into *court, and for a proper conveyance being executed; and the purchaser presented a cross [*282] petition, praying that the Master's report, might not be confirmed, and that he should be at liberty to except thereto. The court held clearly, that although the purchaser had become a party to the reference upon the title, it was not to be intended, that he meant more than to place himself in the same situation upon the Master's report as he would have been in, if the reference had been made in a suit instituted for the specific performance of the agreement, and consequently made an order according to the prayer of the cross-petition.(e)

SECTION VIII.

Of the Decree on Further Directions.

If neither party object to the Master's report, the proper course then is, to apply to have it confirmed, and to set down the cause for further directions.

On the principle, that the court cannot on further directions alter the decree made at the original hearing, where a decree is made at the hearing simply for a reference as to title, the court will not on further directions enter into the consideration of any other objection, which the answer had set up against the execution of the contract. And, therefore, where the particulars of sale were headed, "Brick earth and Land—copyhold—held of the manor of *Fulham," and the estate was described as containing large quantities of superior marle or [*283] brick earth, and it was stated that specimens might be seen on the estate; the defendant, by his answer to a bill for specific performance, admitted the contract but denied that the vendor could make a good title; and insisted also, that as he had purchased the premises for the purpose of digging marle and earth to manufacture bricks and tiles for sale, he ought not to be compelled to perform the contract, unless the vendors could

(d) *Casamajor v. Strobe*, 1 Sim. & Stu. 381.

(e) *Cann v. Cann*, 1 Sim. & Stu. 284.

show that the copyholders of the manor of Fulham were entitled by custom to dig marle and brick earth.

At the hearing the common reference as to title was made, and the Master having reported in its favour, the purchaser then presented a petition praying a reference to the Master to inquire whether the copyholders of Fulham were entitled by custom to dig marle and brick earth, and when it was first shown that they possessed such right, which was ordered to come on at the same time with the hearing of the cause on further directions. It was insisted, that there was nothing in the inquiry now sought, which was inconsistent with the former decree; but that it was merely a supplementary inquiry, without which it was obvious, that justice could not be done between the parties. Lord Gifford, M. R., said, "The defendant by his answer insisted that he was not bound to perform the contract unless it could be shown, that copyholders of this manor [*284] were entitled to dig marle and brick *earth on the lands holden by them. Had the court thought it necessary to inquire into the point, a direction to that effect would have been contained in the decree: instead of doing so, the reference, which it orders, goes only to title. The Master has reported that a good title can be made, and that it could have been made before the filing of the bill; and no exception is taken to the report. The original decree either did, or did not, authorise the Master to take into his consideration in examining the question of title, the right of the copyholders to dig the marle and brick earth. If it did not, then the court never intended that there should be any inquiry into that subject: if it did, the defendant ought to have taken exceptions to the report. To grant the prayer of this petition would be to alter entirely the decree made at the original hearing; which it is not competent for the court to do at the hearing on further directions." (f)

The nature and object of the proceedings on further directions will be most clearly understood, by considering the form of the decree made on that occasion, the ordering part of which is as follows:—

This court doth order and decree, that the agreement in the pleadings mentioned, dated the day of 18 , be specifically performed, and carried into execution. And it is ordered, that it be referred to the said Master, to compute interest, (1) at the rate of 4% per cent. per *annum, on the sum of £ the residue of the purchase-money for the estate and premises comprised in the said agreement, from the day of , 18 , the time when the same ought to have been paid, according to the terms of the said agreement. And the said Master is to take an account of the rents of the said estate and premises received by, or come to the hands of the plaintiff, or to the hands of any person or persons, by his order, or for his use. (g) And it is ordered, that what shall be coming on the said account of rent (after deducting therefrom the sum of £ , the moiety of the excise duty, which, by the said conditions is to be paid by the defendant) be deducted from the sum of £ , and what shall be found due for interest thereon, as aforesaid. And upon the plaintiff executing and deliver-

(f) *Le Grand v. Whitehead*, 1 Russ. 309.

(g) See post. p. 302.

ing to the defendant at the expense of the defendant, according to the said agreement and conditions of sale, a proper conveyance of the said estate and premises contained in the said agreement, (such conveyances to be settled by the said Master, if the parties differ about the same,) it is ordered that the defendant do pay unto the plaintiff what shall be found due on the balance of the said account.(2) And the court doth not think fit to give any costs(3) on either side. And any of the parties are to be at liberty to apply, &c.

**(1) Of the Payment of Interest on the Purchase-Money.*

[*286]

In the absence of express stipulation as to the payment of interest, the general rule is, that when by the articles a day is fixed for the completion of the contract, the vendor shall be entitled to the rents and profits from that period, and the purchaser shall pay interest on the purchase-money at the rate of four *per cent.* The court acted strictly on this rule till very recently, whatever time might elapse before the completion of the contract, frequently to the great hardship of the purchaser as the interest generally exceeds the rents. The rule, however, now seems to be, that where there has been great delay in completing the contract and it is clearly made out that it was occasioned by the vendor, then the court gives him no interest, up to the period when he shows a good title, but leaves him in the possession of the *interim* rents and profits.(h)

The latter part of this rule was introduced and *estab- [*287]
lished by the decisions of Sir J. Leach, as he has stated him-

(h) *Esdaille v. Stephenson*, 1 Sim. & Stu. 123; *Jones v. Mudd*, 4 Russ. 118. With respect to timber on the estate, the rule is different; interest being paid from the time of valuation, for the obvious reason that the value of the timber being necessarily that which it is ascertained to be at the time of valuation, the subsequent growth of the timber stands against the payment of the interest.

When interest is recovered at law, it is always at the rate of 5 *per cent.*, but a court of equity gives interest only at the rate of 4 *per cent.* During the late war, when the rate of interest was high, 5 *per cent.* was sometimes given. (See Sir Edward Sugden's *Vend. & Purch.* 516, 8th ed. for several cases of this description, but having regard to the judges by whom they were decided, they do not appear to be entitled to much weight as equity decisions.) In *Witts v. Dawkins*, (12 Ves. 503) indeed, a decision by Sir W. Grant, interest at 5 *per cent.* was given according to the prayer of the bill, but the point seems to have passed *sub silentio*. Again in *Burnell v. Brown*, (1 Jac. and Walk. 168,) interest at five *per cent.* was given. The decision was by the Lord Chief Baron, (Sir Richard Richards,) and Master Cox, sitting for Sir T. Plumer, M. R. The report states, that the Lord Chief Baron, after consulting with Master Cox as to the rate of interest, directed it to be computed at 5 *per cent.*, observing that he had always been of opinion, that a party withholding money from a person entitled to it ought to pay to the person thus injured, the interest which *he might have made of it*. This however is not the rule, and it cannot be doubted that on a proper application the decree would have been varied in this respect, upon the principle recognised in the nearly cotemporaneous case of *Thorpe v. Freer*, H. T. 1826, stated by Sir Edward Sugden, *Vend. & Purch.* 516, 8th ed. In that case the conditions of sale stipulated that the purchaser should be allowed 5 *per cent.* on the deposit, if a title could not be made, but did not contain any other stipulation as to interest. After decree on a bill by the seller for a specific performance, upon a motion to vary the minutes by making the interest payable on the purchase-money 5 *per cent.*, the Vice Chancellor was of opinion that the general rule must prevail, and that the minutes of the decrees were correct in confining the interest to 4 *per cent.*, and gave the purchaser his costs of opposing the motion. And see *Ackland v. Gaisford*, 2 Madd. 31.

[*288] self,(i) and has obviously sprung out *of the gradual tendency of modern decisions to protect both parties to a contract of sale from the consequences arising out of the dilatory progress of suits for specific performance.

In *Esdaile v. Stephenson*, where the rule as above stated was laid down, the conditions of sale stipulated, "that if the conveyance was not executed by the necessary parties, and the purchase-money paid on or before the 24th day of December, 1819, the purchaser should pay interest on the purchase-money at 5 *per cent.* until the purchase should be completed." With respect to which, his Honour observed,

[*289] "that, "in the present case the interest does not depend upon any rule of the court, but upon the express stipulation of the parties, and the terms of that stipulation apply to every delay however occasioned." The court accordingly gave the vendor interest from the day named, although it does not appear from the case as reported, that there was any express stipulation that interest was to be payable, notwithstanding delay.

It is immaterial, however, to consider this case more minutely, since, in several recent decisions, the same judge has refused interest until a good title was made, notwithstanding there was in the conditions of sale an express provision, that if by any unforeseen or unavoidable circumstances the conveyance should not be completed on the day named, interest should be paid. Thus, in *Monk v. Huskisson*,(k) the contract contained the following stipulation, "that the vendors would show a good title and execute a conveyance on or before the 25th day of December then next; that the crown on payment of the purchase-money should be entitled to the rents from that day; and that if, by reason of any unforeseen or unavoidable obstacles, the conveyances and assurances aforesaid could not be prepared or perfected for execution on the said 25th of December, the said William Huskisson, &c., or the commissioners for the time being of His Majesty's woods, forests, and land revenues should, by and *out of the land revenues of the crown,

[*290] pay interest for the said purchase-money, from the said 25th

(i) "That as to payment of the purchase-money, it was a general but not an universal rule, that when a specific performance is decreed, the vendor is entitled to his purchase-money, with four *per cent.* interest from the time when the money was contracted to be paid, and the purchaser is entitled to the rents and profits from the time when possession was to be delivered. Sir William Grant seems to have considered the rule as universal, but I have held that, where the vendor has improperly delayed the execution of the contract and refused to give possession, he ought not to be benefitted by the delay he has occasioned. (Per Sir J. Leach in *Paton v. Rogers*, 6 Madd. 256.) The old rule, as here alluded to by Sir J. Leach, is very clearly explained by Sir T. Plumer, M. R., in *Burton v. Todd*, (1 Swanst. 260.) "The usual course," observes his Honour, "is, that the purchaser shall receive the rents and pay 4 *per cent.* interest on the purchase-money; a practice rather hard where the delay is not caused by him, the rents seldom yielding 4 *per cent.*, and the purchaser after having been deprived of the enjoyment of the estate receiving it at last in a worse condition. In the present case, a delay of fifteen years has been caused by the resistance of the vendors, and I think it is necessary to distinguish this case from those in which the court has adopted the rule of giving to the purchaser the rents and profits of the estate, and to the vendor interest on the purchase-money. That rule was founded on the principle recognised by courts of equity, that from the moment of the contract, although no purchase-money is paid, the estate is to be considered as the property of the purchaser, and the purchase-money the property of the vendor." This appears to have been the first instance of departure from the old practice.

(k) 4 Russ. 121, n.

day of December, (from which time His Majesty was to be entitled to the rents and profits of the said premises,) after the rate of *£5 per cent.* per annum until the completion of the said assurances." Sir J. Leach, M. R., adhered to the rule that the vendor was not entitled to interest before the time when a good title was shown; and he stated, that the effect of the stipulation, which had been relied on, was, not to give interest when interest would otherwise not have been payable, but to fix the rate of the interest to which the vendors might be entitled at *£5*, instead of *£4, per cent.* And so in *Birch v. Podmore*,^(l) where the contract stipulated, that if by reason of any unavoidable obstacle, it could not be completed on a given day, the purchaser should pay interest at *£5 per cent.* from that time until the completion, and the vendor did not make a title until five years after the original hearing, no unavoidable obstacle being shown, the court refused interest.

If no period be fixed for completing the contract, and the purchaser be let into possession, he must pay interest on the purchase-money from that time; the act of taking possession being an implied agreement to pay interest.^(m) So where a tenant in possession, with an option to purchase, elects to do so, *and declares his option accordingly, he will be entitled to the rents, and must pay interest [*291] on the purchase-money from that period.⁽ⁿ⁾

On the other hand, though it be, as a general rule, perfectly clear and reasonable, that a purchaser in perception of the rents and profits of the land shall pay interest, cases may nevertheless arise, in which, although he is in the receipt of the rents and profits, he shall not pay interest.^(o) In order, however, to constitute such a case, the delay in completing must be ascribable entirely to the vendor, and it must be shown that he had notice, that the money was lying idle. And accordingly in a recent case,^(p) where the purchaser upon entering into the contract, had lodged a sum of money with his banker sufficient to complete, and, upon entering into possession, gave notice to the vendor, that he was ready to invest the purchase-money as he should direct, pending the investigation of the title; and no answer being returned, the purchaser kept in his banker's hands a balance equivalent to the amount of the purchase-money, during the period of investigating the title, (except for four days, when it was a little less,) Sir J. Leach held that, after the notice given, it would be unreasonable, that the purchaser should be charged with interest; but as the purchaser had made some profit of the money, —first, because his banker's balance *was, in a small degree [*292] and for a few days, below the amount of the purchase-money, and, second and principally, because the purchase-money supplied the place of that balance, which he must otherwise have maintained at his banker's, His Honour directed a reference to the Master to inquire what was the average balance at his banker's during this period, and what was his average balance during the three years previous, and de-

(l) V. C. 17th January, 1828, stated in Seton on Decrees, 213.

(m) Fludyer v. Cocker, 12 Ves. 25.

(n) Townley v. Bedwell, 14 Ves. 541.

(o) "But it must be a strong case, and clearly made out." Per Sir W. Grant, in Powell v. Martyr, 8 Ves. 148.

(p) Winter v. Blades, 2 Sim. & Stu. 393.

clared that to the amount of that difference the purchaser was not chargeable with interest.

In order to exempt a purchaser, in the perception of the rents and profits, from payment of interest on his purchase-money, three conditions must concur:—1st, The delay must be imputable to the vendor only. 2nd, The vendor must have proper notice that the money is lying idle, and awaits his orders as to the investment of it. 3rd, It must be clearly established, that the money has actually been unprofitable to the purchaser. And therefore in a recent case, where the purchaser was to pay a deposit of *£25 per cent.*, and in case of delay *£5 per cent.* interest, and the auction duty to be paid in equal shares by vendor and purchaser, and a long delay had occurred through the default of the vendor, who remained in possession, and had also received one-third of the purchase-money, he was decreed to account, not only for the rents, but for interest at the rate of *£4 per cent.* upon one-third of them.(g)

[*293] *So on the other hand there may be converse cases in which the circumstances are exactly reverse, where a purchaser shall be ordered to pay interest on the purchase-money, and yet shall not be allowed an occupation rent, although the vendors may have been in occupation of the premises all the time. The principle is the same in both classes of cases; in the former the vendor being guilty of wilful delay with full knowledge that the purchase-money was lying ready and unproductive,—there being in the latter wilful delay on the part of the purchaser with the knowledge that the vendor was ready to deliver up possession, and though in possession the occupation being substantially unprofitable to him. Thus in *Dakin v. Cope*,(r) which was a suit for the specific performance of an agreement for the purchase of a leasehold public house and the goodwill and licences connected with it, and also for the sale of the stock in trade furniture, fixtures, brewing utensils and other effects on the premises, which latter were to be taken at a valuation, the defendant became the purchaser, and the valuations were made; but on the 29th of September, the day on which possession was to be delivered, the defendant, on the ground of an objection to the title, refused to complete. There was a decree against him, and he was ordered to pay interest on the principal and the amount of the valuation (except as to so much of the stock in trade as could not be delivered to him,)

[*294] and to be charged *with all sums of money, which the plaintiff had laid out for rent, taxes, and other necessary out-goings, from the said 29th of September, the court refusing, nevertheless, to allow the defendant for an occupation rent to be paid by the plaintiffs; with respect to which Lord Eldon observed, “as the decree asserts that the defendant ought to have taken possession, he cannot charge an occupation rent against those who have possession only by reason of his wrong-doing.”

Where the property which is the subject of sale, is reversionary, interest is also to be paid from the day fixed for completing the contract; for though in this case there are no rents and profits, the wearing away of the lives in possession is considered an equivalent;(s) and where the sale is before a Master under a decree of the court, interest must be paid

(g) MS.

(r) 2 Russ 170.

(s) *Davy v. Barber*, 2 Atk. 490; S. P. 2 Sim. 358.

from the day on which the purchaser could have confirmed the report;(*t*) and the same rule applies to the sale of annuities.(*u*)

The purchaser never pays interest on the deposit, although the delay in completing the contract may have originated with himself.(*v*) Neither is the auctioneer liable for interest on the deposit; and therefore where the purchaser proceeds against the auctioneer for the recovery of the deposit he cannot have interest: and the reason is, that the auctioneer is a mere stakeholder, subject to be *called upon to pay at [*295] any moment, his engagement being to hold the deposit until the contract of sale shall be completed or rescinded. It seems at one time to have been thought that when the auctioneer had made interest, he might be liable to pay interest;(*w*) but in the late case of *Harrington v. Hoggart*,(*x*) this notion was put an end to, it being there held, upon great consideration, that the mere fact of the auctioneer having made interest makes no difference. Lord Tenterden, in giving judgment, after adverting to the distinction between an agent and an auctioneer said, "if an agent receive money for his principal, the very instant he receives it, it becomes the money of his principal. If, instead of paying it over to his principal, he thinks fit to retain it and make a profit of it, he may, under such circumstances as occurred in that case,(*y*) be liable to account for the profit. Here the defendant is not a mere agent, but a stakeholder. A stakeholder does not receive the money for either party, he receives *it for both; and, until the event is known, it is his duty to [*296] keep it in his own hands. If he think fit to employ it, and make interest of it by laying it out in the funds or otherwise, and any loss accrue, he must be answerable for that loss, and if he is to answer for the loss, it seems to me he has a right to any intermediate advantage which may arise. The defendant here has not laid out, or made, a profit of the plaintiff's money; for at the time he laid it out, it was not the plaintiff's and it was doubtful whether it would ever become so or not."(*z*)

It makes no difference that one of the parties to the contract may have given the auctioneer notice to invest the deposit; because the auctioneer, being a trustee for both parties, it is not competent for one of them to vary the nature of the trust without the consent of the other, and neither of the *cestuis que trust* can therefore compel the auctioneer to invest without the consent of the other. This point also arose in the same case of *Harrington v. Hoggart*, and Lord Tenterden, with respect to it, said, "then there is the special circumstance of the requisition by Sir John Harrington to the defendant, that he should lay out the money. The

(*t*) *Child v. Lord Abingdon*, 1 Ves. Jun. 94.

(*u*) *Twigg v. Fifield*, 13 Ves. 517.

(*v*) *Bridges v. Robinson*, 3 Mer. 694.

(*w*) See *Farquhar v. Farley*, 7 Taunt. 592, where C. J. Gibbs says, "if, indeed, it had appeared that the auctioneer had actually made interest of the money, it might have been a question, whether that interest might not be recovered against the auctioneer." With respect to this *dictum*, Lord Eldon is stated (1 Barn. & Adolph. 583) to have made an observation in this case of *Harrington v. Hoggart*, when it was before him, to this effect—"Adverting with deference to the *dictum* of Sir V. Gibbs, I must say I cannot readily give into that doctrine. The strong inclination of my own opinion is, that it makes no difference whether interest were made or not."

(*x*) 1 Barn. & Adolph. 577.

(*y*) *Rogers v. Boehm*, 2 Esp. 702, to which his Lordship is here referring.

(*z*) *Harrington v. Hoggart*, 1 B. & A. 587.

answer given to that was, 'I will do it if Mr. Secretan will consent,' which was saying in effect, though not in words, 'I am a stakeholder: I am answerable to Mr. Secretan for the money, or I may be in the result; [*297] and I cannot without his consent, therefore, *do that which you ask.' Mr. Secretan's consent was never obtained. As to the offer of an indemnity, it was not insisted upon, and it could not well be insisted that any person is bound to take an indemnity of another. Therefore that special circumstance, in my opinion, does not take the case out of the general rule, or deprive the defendant of the character of a stakeholder, or of the advantages, if there be any, which belong to that character, nor exempt him from the obligations arising from it."

But though the purchaser is not liable for interest on the deposit, the vendor may be. Lord Tenterden, after observing, that there is no case in which interest has been recovered against an auctioneer, lays it down, that there has been, as there may well be, a recovery of interest by the purchaser against the vendor, where the latter has not been able to complete his contract; but that has been as part of the damage, which the purchaser sustained by the non-completion of the contract. Part of the damage is the loss of the use of that money, which in the mean time has been lying idle in the hands of the auctioneer. There may be cases, also, in which the vendor may have a right of action for damages against a purchaser who has failed to complete his contract.(a)

[*298] *Where a purchaser makes payments from time to time exceeding the interest due at the time of such payments, rests are always made in taking the accounts;(b) and the balance only will carry interest from the successive periods of making these rests. The court will also direct the account to be taken with rests in other cases, where justice could not otherwise be fairly administered between the parties. Thus in a case of *Comer v. Walkley*,(c) where it appeared that a sum having been left in the purchaser's hands, at interest, as an indemnity against an incumbrance, and that the purchaser afterwards paid part of the sum to the vendor, notwithstanding which the purchaser and his devisees continued to pay interest on the whole for many years. A bill was at length filed to compel payment of the residue of the sum deposited, and the mistake being admitted, the Master was directed to take annual rests of the over-payments, and to compute interest thereon at five *per cent.*, and the amount of the over-payment and interest to be deducted from the sum which would be found due from the purchaser.

Where a sale is set aside on the ground of fraud and inadequacy of consideration, it is clear that complete justice would not be done to the owner of the estate, without directing the excess of the rent over [*299] *the interest of the purchase-money, to be applied in reduc-

(a) *Harrington v. Hoggart*, 1 B. & A. 588; and see *Bernales v. Wood* (3 Camp. 258,) which was an action against a vendor to recover back the deposit paid on the purchase of an estate, the vendor not being able to make a good title, and it was held, that if the plaintiff declare specially, and alledge as special damage, that he has lost the use of his money, on making out his case he will be entitled to interest on the deposit-money from the time the purchase should have been completed.

(b) *Griffith v. Heaton*, 1 Sim. & Stu. 271.

(c) Stated in Sir Ed. Sugden's *Vend. & Pur.* 8th ed. 511.

tion of the purchase-money. This question was a good deal considered in a recent case of *Donovan v. Fricker*.^(d) There a sale, by assignees under a former commission, was set aside by assignees under a second commission on the ground of fraud, on the usual terms of redemption. The excess of the rent above the interest was considerable. On a petition that the Master should apply this excess in reduction of the purchase-money, Sir Thomas Plumer observed, "if we give interest at five per cent. to the wrongful purchaser, can we refuse to charge him with interest on the rents, and thus in effect give him interest on his purchase-money, after the whole of it has been repaid to him? Looking at it, independently of the authorities, the rent, if applied to reduce his principal, would gradually sink the whole of it. Now this rent belonged to the plaintiffs, and ought to have been paid to them; the defendants kept it, and had the benefit; then are they to go on receiving the same amount of interest while they have this fund in their hands? Without supposing any fraud, but considering that restitution is to be made on each side, justice requires that the one debt should be set off against the other."

The only principle on which justice can be done to all the parties, is by placing them as nearly as may be in the situation, in which they would have been, if the contract had not been entered into. [*300]
 *This seems to be most conveniently done by setting the excess of rent over the interest of the purchase-money against the principal of the purchase-money, the effect of which is to give the vendor interest upon the rent, which, for the reasons just stated, he is clearly entitled to.

The same principle was applied in *Todd v. Gee*.^(e) In this case there was a decree for specific performance, after an interval of fifteen years from the date of the agreement, the delay having been occasioned by the vendor: one-third of the purchase money was paid very shortly after the sale, and the vendors had retained this sum (which was considerable, the purchase-money being £16,000,) and also possession during the whole of this period. With respect to the principle on which the accounts were to be taken, Sir Thomas Plumer after adverting to the rule which then existed, entitled the purchaser to the intermediate rents, and the vendor to interest on the purchase-money, and explaining the principle of that rule, proceeded thus: "But in this case the immediate payment of a part of the purchase-money (no less a sum than £5,600) requires a deviation from the usual practice. The vendors have not only continued in possession and been in perception of the rents and profits for the last fifteen years, but during that long period have also enjoyed the benefit of this large portion of the purchase-money, *and instead, [*301] as in the common case, of now receiving the whole amount with simple interest in a gross sum, they have had the opportunity of making compound interest on one-third part, during a number of years sufficient to double the principal. If, therefore, in this case the common rule were adopted, the effect would be to give to the vendors, who from the issue of the suit stand as aggressors, a double advantage, and to sub-

^(d) Jac. 165.

^(e) A cause and cross cause, by the name of *Burton v. Todd* and *Todd v. Gee*, 1 Swanst. 255.

ject the innocent purchaser to a double loss, namely, a loss of the benefit to be derived from an annual receipt of the rents and of such profits as a continued use of his £5,600 would have given to him beyond the interest for which he would now have been accountable to the vendors. That rule would bestow on the wrong-doer all the benefit of his own delay, and inflict all the evil on the rightful suitor. Under these circumstances equity demands that some mode should be adopted, by which the purchaser may be placed as nearly as possible in the same situation as if no part of the purchase-money had been paid. The case is novel, and I am aware of no precedent; but, on principle, I think that in strict justice and conscientious dealing a proportionate share of the estate should have been conveyed to him in immediate exchange for his purchase-money; the most equitable course in the power of the court appears to be, in addition to the usual directions, to allow to the purchaser interest upon the rents and profit of so much of the estate as is proportionate in value to the purchase-money already paid." His Honour [*302] was *therefore of opinion that the vendors ought to account not only for the rents and profits of the estate from October 1802, but also for interest after the rate of 4 *per cent.* upon one-third of the rents and profits.

Before the conveyance the purchaser cannot proceed for the rents himself, or he can only do so in the name of the vendor; which in all cases, where it is improper to take possession, would be a very premature act of ownership. The care of the estate must therefore necessarily be left with the vendor; he becomes a trustee for the purchaser, and must take the same care of it as he would if it were his own, and must take such measures as every prudent landlord would do; and there is no hardship in this, for if it be finally determined that the estate belongs to him, he retains the rents and has the benefit of the improvements and advantages resulting from his care.

As the vendor may call for interest on his purchase-money, though the vendee has suffered it to lie dead;(f) so, on the same principle, the purchaser is entitled to have the rents and profits which have, or might have been derived from the estate. If the vendor have received rent, therefore, he must account for it; if he have suffered tenants to run in arrear, he is responsible for the loss thereby occasioned;(g) [*303] *and he must account not only for the rents actually received, but for such as, without his wilful default, might have been received;(h) and if the estate have suffered any deterioration from want of due repairs or otherwise, through default of the vendor, a reference will be directed to the Master to ascertain the amount of injury, and the vendor will be made liable for the loss.(i) As to deterioration

(f) *Roberts v. Massey*, 13 Ves. 561.

(g) *Ackland v. Gaisford*, 2 Madd. 32. *Gell v. Watson*, 2 Sim. and Stu. 402.

(h) *Wilson v. Clapham*, 1 Jac. and W. 36.

(i) *Foster v. Deacon*, 3 Madd. 394; and see *Harford v. Purrier*, (1 Madd. 532,) where a vendee before a conveyance, having agreed with the tenant that, if he had a conveyance by a given time, the tenant should quit at that period, and the tenant misconstruing the agreement, quitted before a conveyance was made, so that, the land was untenanted and deteriorated, the court held that the loss must fall upon the vendee,—it being occasioned by his agreement with the tenant.

after he took possession, or after there was a title under which he might take possession, the purchaser cannot have an allowance in respect of that; but for deterioration, before he took possession, or before there was a title under which he could take possession, he is entitled to an allowance.^(k) So where a purchaser paid his purchase-money *into court under an order for that purpose, and afterwards established the amount of his claim for deterioration in a trial at law, which had been directed in the decree on further directions, he was allowed interest on the amount from the time he paid the purchase-money into court, on the ground that to that extent he paid in his own money; and also his costs of the trial, Sir J. Leach, V. C., saying, as to the costs, "this is not a question of conduct in which both parties are implicated; but the vendor was bound to take care against this deterioration, and I should not make the purchaser the allowance he is entitled to, if I made him pay the costs of the trial."^(l) So *where he could have confirmed the report of his being the best bidder.^(m) [*304] [*305]

In taking the account of the rents and profits of the estate, if it be in the occupation of a tenant, his rent will, unless there are special circumstances, be taken as the annual value of the estate; if the vendor himself be in possession, he will be charged with an occupation rent, to be ascertained by a reference to the Master.⁽ⁿ⁾

Upon an investment of stock by the vendee, the title not being ready, and the vendor having notice, but returning no answer, the advantage by a rise, as the loss by a fall, is the vendee's. Thus in *Roberts v. Massey*,^(o) which was a suit by the vendors for specific performance, the plaintiffs not being prepared to make a title at the time appointed, the defendant gave them notice that he had paid the money into a bank, where it was not producing interest, and that he would not be answerable for interest. Afterwards he invested the money in the three per cent. consolidated Bank Annuities, when they were at 50, giving notice of that also to the plaintiffs, who returned no answer for two years and a half, when, the funds having risen to between 60 and 63, they signified their assent, and claimed the stock upon making out the title to the estate. The defendant, submitting to take the estate, insisted that the plaintiffs

(k) *Binks v. Lord Rokeby*, 2 Swanst. 226. The usual form of the order of reference is as follows:—"And it is ordered that it be referred to J— S—, Esq., the Master to whom this cause stands referred, to enquire and state to the court whether the lands contracted to be sold to the said William Jones, John Williams, and William Gaunt, or any and which of them, or the hedges, fences, and gates upon them, or any and which of them have suffered any and what deterioration, and if any, to what amount by unhusband-like and negligent management of the said estates, or any of them, since the respective dates of the said contracts mentioned." After this order has been obtained, the party claiming the compensation carries in the state of facts, and claims for such deterioration, setting out the particulars of the lands or other property purchased, as found by the Master, the date of the contract, and the particular charge of waste, neglect, or damage, which the property has since sustained, and concluding with a claim of a specific sum as a remuneration for such loss. This requires to be supported by affidavits of persons conversant with the particular property in question, and who have known the nature of its former and present state and condition, with a statement of the sum claimed, being in their judgment a fair and reasonable compensation for the damages sustained. For a very able precedent of a report of this nature, see *Bennet on the Master's Office*, App. p. 83.

(l) *Ferguson v. Tadmán*, 1 Sim. 533.

(m) *Child v. Lord Abingdon*, 1 Ves. Jun. 94; see 4 Madd. 355.

(n) *Dyer v. Hargrave*, 10 Ves. 510.

(o) 13 Ves. 541.

[*306] were entitled only to the purchase-money, *with interest. The plaintiffs contended that the investment of the money amounted to a tender and appropriation. Sir W. Grant said, "it does not appear to me that this has the nature of a tender. The intention was not, that the money was to be accepted, or that the defendant should part with it; for the conveyance was not ready. The money was to be paid over only when the conveyance was made: the purpose of depositing the money was merely to stop interest. That is the only effect of the deposit, and that effect it would have had; that if the money was ready at the day, the defendant giving notice, which is required in some cases, and the vendor not being prepared to make a title, or a sufficient conveyance, interest should not run from that time. But I never knew that a deposit had any other effect; that it imposed a liability or a responsibility upon the party to whom that notice was given; throwing upon him any risk as to the principal. The principal remains entirely at the risk of the party making the deposit. Suppose a loss had happened, and the defendant attempted to throw the loss upon the plaintiffs, could he do so? They would have said he gave them notice of a purpose and intention not theirs, but his own. They would have asked what business they had with his intention; what obligation, notice of what he resolved to do, could impose upon them? They would have said he could not impose upon them even the duty of dissuading him, and of stating the consequences; all that is for him to judge of. It would, therefore, *have been absolutely impossible for him, if the stock had fallen, to throw the loss upon the plaintiffs; and the converse is a necessary consequence; that an advantage having arisen, it is impossible for them to claim the advantage. As the risk was his, the benefit also must be his."

Where the purchaser pays into court a sum of money on account, and in part of the purchase-money, which is invested at the request of the vendor, it is the money of the vendor, who is to take the chance of the rise or fall of the stocks.(p)

(2) *Of the Payment of the Purchase-Money into Court.*

Until a very recent period the purchaser was never called on to part with his purchase-money till the vendor was in a situation to make him a good conveyance of the estate; and accordingly the conveyance, and the payment of the purchase-money, were always contemporaneous acts. A variety of circumstances combined, however, towards the termination of the late war, to render it necessary for a court of equity to interpose, and take the money into its own custody in certain cases, although it could not then give the purchaser a conveyance of the estate. The principal cause was the great length of time to which it was possible for an [*308] unwilling or dishonest *purchaser to protract the suit, and delay the completion of the contract. Purchases were made by land-jobbers, who had not the means of payment till they had re-sold;

(p) *Gell v. Watson*, 2 Sim. and Stu. 402. "Although not so stated in the report, it appears that, in this case, the money was invested at the request of the vendor. (Sir Edward Sugden's Vend. and Purch. 514, 8th ed.)"

parties became purchasers, and afterwards, owing to some sudden change in the value of land or money, became desirous of getting rid of a bargain fairly entered into; the purchaser got into possession, sometimes with, sometimes without, or even against, the consent of the owner, and, by means of a Chancery suit, frequently kept the owner out of both his estate and the money for a long series of years,—a course of proceeding always harassing and unjust, and frequently ruinous to the vendor. The best remedy for such a state of things would have been a due abridgment of the duration of Chancery proceedings; but this being thought at that time impracticable, Lord Eldon interposed with another remedy: in cases where the purchaser had got into possession, controlling him if his conduct was vexatious and dilatory, or if he had exercised acts of ownership, or was in insolvent circumstances, or likely to get out of the jurisdiction, by ordering the purchase-money into court, or granting a *ne exeat regno*, or setting an occupation rent according to the exigency of the case; the object being, on the one hand, to deprive the purchaser of all motive for needless delay, and on the other, to protect the interests of the vendor.

This practice, at first adopted very cautiously, and only on pressing occasions, and principally to meet the consequences of the dilatory character of Chancery *proceedings, has now become a very [*309] general occurrence, and is oftentimes resorted to in cases where its effect is to work considerable hardship to purchasers, owing to their entering into possession without taking due precaution to prevent its being considered an acceptance of title, and by committing trifling acts of ownership and waste, which are generally held by the court to have this effect.

The principles on which the court acts in cases of this description, appear to be reducible to these considerations;—that to entitle the vendor to call on the purchaser to pay his money into court, it must be quite clear on the one hand, that the vendor will be ultimately entitled to a decree, and in such cases the purchase-money is ordered into court on the ground of its being an equitable debt; or on the other, there must be such circumstances in the situation or conduct of the purchaser, as may be sufficient to satisfy the court that the money is not secure in his hands, and then the court orders the money to be paid in for safe custody, to abide the event of the suit. To the former class of cases belong those in which a purchaser in possession has cut timber,—pulled down or made alterations in the buildings,—entered into agreements for sale,—or done other acts of a similar description,—acts, which can only be considered as rightfully done, on the presumption, that he considered the estate as belonging to himself. If these acts have been done after the abstracts were delivered, and the purchaser had become cognizant of the state of the title, the only inference *that can be reasonably drawn [*310] from them is this, that he had determined to accept such title as was shown him. Under such circumstances it is clear, that the suit is substantially at an end; inasmuch as the taking possession under the agreement is a virtual affirmance of the contract, and the acts of ownership are an acceptance of the title. There is nothing more for the court to do, and it very properly puts an end to the only object the purchaser can be supposed to contemplate in protracting the suit, by compelling him at once to pay his money into court.

The other class of cases depend on different principles and give rise to more varied forms of relief,—because in them the object being to protect the vendor, this may be done by other means quite as effectually, as by ordering in the purchase-money. It is a strong measure to order in the purchase-money, when it is not clear that the sale must be ultimately completed; and therefore the court in such cases will adopt other expedients if they will be equally effective. The justice of the case may probably be satisfied by ordering the purchaser to elect between giving up possession and paying in the money,—by ordering him to pay an occupation rent to be fixed by the Master, unless the parties can agree as to its amount,—by appointing a Receiver and reserving or not, according to the exigency of the case, whether this shall be at the expense of the vendor or purchaser,—or by granting a writ of *ne exeat regno*, when the vendor is likely to be prejudiced by the purchaser leaving the [*311] country with a view to a permanent residence in foreign parts. The object contemplated by the court in all these cases, being simply the protection of the vendor, and consequently not going for this purpose beyond what the circumstances may actually render necessary.

In general mere possession by the purchaser under the contract, or consistently with it, does not entitle the vendor to have the purchase-money paid into court;(q) it being the vendor's own fault that he let the purchaser into possession before he was sure that he could make a title, and without having provided for the payment of the purchase-money. Expressions do indeed frequently occur to the effect, that a purchaser cannot retain both the land and his money;(r) but they must always be considered with reference to the circumstances of each case where they are found, for there are many cases in which the court will leave him in possession of both; as when he enters on the premises under the express terms of the agreement, or by the consent of the vendor, and has [*312] not been guilty of any misconduct *in delaying the completion of the contract, or in dealing improperly with the estate.

There is, however, a class of cases in which possession alone, independently of improper dealing with the estate, will be sufficient to induce the court to order in the purchase-money. These are—1st, Where the possession has been obtained against the consent of the vendor, or without his privity,(s)—2nd. Where the sale is under a decree of the court, and the purchaser takes possession; unless he entered with the express consent of the court, he will be ordered to pay in his money.(t)

Where the purchaser is in possession consistently with the agreement, or with the vendor's permission, not dealing improperly with

(q) *Clarke v. Elliott*, (Madd. 608;) *Morgan v. Shaw*, (2 Mer. 140.)

(r) Thus in *Smith v. Lloyd*, (1 Madd. 83,) Sir T. Plumer is reported to say, "The vendor in possession, objecting to the title, must either pay the purchase-money into court, or give up possession." Principally, however, on the authority of *Clarke v. Wilson*, (15 Ves. 316,) where similar language is used; but the true principle of the doctrine, was not then very clearly understood, and both these cases appear to have passed off without much discussion.

(s) *Blackburn v. Stace*, (6 Madd. 69.)

(t) *Anon. L. I. Hall*, 16th July, 1816, MS. cited in Sir Edward Sugden's *Vend. and Purch.*, p. 214, 8th ed.

the estate, but delaying the completion of the contract by objections, the court will generally give him the option of paying in the money or giving up possession; but being in possession, making no objection to the title by his answer, and submitting to perform the contract, he will be ordered to pay in his money.^(u)

Where the purchaser is in possession and exercising *acts of ownership, it is perfectly immaterial under what circumstances possession was taken, for, in such cases he will be compelled to pay in his money; and it does not seem to be very material whether the effect of such acts be to prejudice or improve the estate; because in either case, the inference, which the court draws from them is, that the purchaser by such acts has treated the estate as his own; an inference quite as strongly supported by acts which improve, as by those which deteriorate, the estate.^(v)

The principle on which the court proceeds, in cases where the purchaser has exercised acts of ownership, is well explained by Lord Eldon, who says, that "where possession is agreed to be delivered, with nothing more, if there is a dispute about the title, the vendor cannot come to secure the purchase-money; but, if the nature of the agreement be, that the purchaser is to enjoy the estate, such as it is, and he takes upon himself to alter the nature, or destroy part of the estate, he puts his possession under circumstances different from those, which his engagement required."^(w) In other words, *he deals with the estate, as if it were his own property; and having done [*314] acts, which could only be authorised on that supposition, the fair legal presumption is, that he intended to waive any objections there might be to the title.

Where however, the purchaser is in possession under the agreement, and the delay in completing the contract has arisen from the inability of the vendor to make a title, the vendee it seems will not be ordered to pay his purchase-money into court. Thus in *Gell v. Watson*,^(x) where the bill was filed for specific performance by the vendor, the agreement bore date in December, 1809; part of the purchase-money was to be paid in on or before the month of February, the residue on the 20th November following; and the purchaser was to be let into possession on the 25th of the intervening month of March. The defendant accordingly entered into possession, and exercised various acts of ownership, such as making alterations, pulling down buildings, erecting others, permitting a turnpike to be made through the estate, contracting to sell part

(u) *Buck v. Lodge*, 18 Ves. 450; in this case the subject of sale was a coal-mine, and the purchaser in possession, and working it; *Crutchley v. Jerningham*, 2 Mer. 502, where the purchaser by his answer stated that "he believed it might appear by the abstract, that the plaintiffs were able to make a good title, but said that the title had not been approved by counsel, and therefore reserved the right of objecting," upon which Lord Eldon, on a motion for payment of the purchase-money, said, "But the material circumstance was, that he had admitted a good title, insisting, nevertheless, that he had a right to object, the title not having been approved by counsel," his Lordship, however, was of opinion, that, having admitted so much, this was a sufficient ground for ordering the money into court.

(v) But see *Bramley v. Teal*, (8 Madd. 219,) where a different conclusion is drawn as to the effect of acts which improve an estate.

(w) *Dixon v. Astley*, 19 Ves. 564.

(x) 3 Madd. 225.

of it, and receiving part of the purchase-money. The title was not complete till the year 1817, when it was made so by an Act of Parliament. On a motion for the purchaser to pay the purchase-money into court, Sir Thomas Plumer said, "here the possession was according to the agreement; the cause of possession without payment of the residue of [*315] the purchase-money *is explained, inasmuch as the defendant was unable to get a good title. The defendant insists that the acts of ownership are not to be construed as an acceptance of the title, and he is fortified in this defence by the vendor having thought it necessary to obtain an Act of Parliament." On these grounds His Honour refused a motion for payment of the money, but without costs.

The same reasoning which applies to the case where the vendor is unable to make a good title will, with very little modification, apply to cases where he has neglected to do so; and, therefore, the court will not interfere, by ordering in the purchase-money, where it appears that the vendor has been guilty of *laches* in perfecting the title. Thus in *Fox v. Birch*,^(y) by articles, dated the 23rd June, 1808, it was agreed that the defendant should become the purchaser of certain estates; the abstract to be delivered on or before the 12th July, following. The bill alleged, that the defendant entered into possession under this agreement, that the abstract was delivered pursuant thereto, and that the title appearing on such abstract was good. It appeared by the answer that the defendant was already in possession under a prior verbal agreement; that the abstract was delivered on the 10th June, 1814, to which the defendant took objections, which had not been removed; that the defendant had laid out £3,000, in erecting buildings on the land, with a view to [*316] the occupation of both, *by which the possession of these premises had become necessary to him, and that he had reason to believe the plaintiff could make a good title, by using proper diligence, although he had hitherto neglected so to do. On the coming in of the answer, the plaintiff moved, that the purchase-money be paid into court; Lord Eldon said, "that although in the ordinary case of a purchaser being let into possession, he must be taken to have waived, or to have given reason to expect, that he will waive objections to the title; yet there is another class of cases in which the purchaser gets into possession by the courtesy of the vendor, when it must depend upon the particular circumstances of each case, Whether he shall be compelled to pay in his purchase-money before the completion of the title?" In the present case it was not denied that there was a degree of *laches* on the part of the vendor in making out his title, and for this reason his Lordship refused the motion.

Where possession is taken under a mutual expectation, between the vendor and purchaser, of a good title being speedily made, and upon an understanding that the latter shall not be called on for the purchase-money till a good title is made, and unexpected difficulties afterwards spring up, which are a surprise upon both parties, the court will not make an absolute order on the purchaser to pay the money into court, because this is directly contrary to the terms of the contract; but on the other hand, the court "having always a great anxiety to take the money

(y) 1 Mer. 105.

from the purchaser, when he has *taken the estate out of the hands of the owner," will pursue a middle course, leaving [*317] it in the discretion of the purchaser, either to pay the money in or give up possession of the estate;(z) for though it may not be just to call upon the purchaser to pay his money, he may be properly required to restore the land. He must do the one or the other, unless the vendor intended to trust him,—and that was their contract,—with the possession of the land, until he, the vendor, by making a conveyance of the estate, made out his title to the money. Thus in *Morgan v. Shaw*,(a) the agreement provided that the purchaser was to have possession of part of the premises on the 2nd February, and of the residue on the 1st May, 1814; but that, if by reason of any obstacle (other than a defect of the title, which should not be cured by the vendor on or before the 25th December, 1814,) the purchase was not completed on or before the 24th June, the defendant should pay interest on his purchase-money from that time, if the purchase was not completed through a defect of title the plaintiff was to return the deposit; the abstract and agreement to be laid before counsel on the part of the vendor and purchaser, and if such counsel should be of opinion that no good title could be made, the agreement to be void. The purchaser was accordingly let into possession, and the abstract laid before counsel, who were of opinion that a good title could not be made. The defendant *sent to the plaintiff notice of [*318] this, and that the agreement was consequently at an end on the 20th December, 1814. The purchaser by his answer insisted that it was the intention of the parties in fixing the 25th of December, 1814, as the time for completing the title, that the agreement should fail, if not in that respect literally fulfilled; and a good title, not having been made by that time, he submitted that he was wholly released from the agreement. After the bill was filed, the title was, by the defendant's consent, again submitted to counsel, but on an express stipulation that if not approved, the agreement should be cancelled; and in May, 1815, a second opinion was given against the title. Subsequently to this, further evidence was furnished, and the plaintiff filed a supplemental bill, to which the defendant put in an answer, insisting on various acts of delay by the plaintiff in making out his title; that, in allowing a further opinion to be taken, he, the purchaser, had intended only to give reasonable time, and not to keep the contract always on foot; and that under the circumstances, he was fully justified in refusing to complete the contract. The defendant had repeatedly offered, both before and after the second opinion was taken, to give up possession of the estate, and pay a fair rent for the time he had continued in possession. The plaintiff now moved for a reference to the Master, to inquire whether he could make a good title to the estate; and in case the defendant should refuse to consent to such reference, then that he might within a month pay the remainder of his *purchase-money into court. Lord Eldon refused the ap- [*319] plication, stating the rule of the court to be, "that if the agreement allowed possession to be taken before the purchase is completed, the mere fact of possession is not a sufficient ground for making the order without further circumstances. In a case of this sort, where one of the parties insists that the bargain is at an end, it is against con-

(z) *Gibson v. Clarke*, 1 Ves. & Bea. 500.

(a) 2 Mer. 138.

science that he should be allowed to keep his purchase-money, and to retain possession also. But here the defendant took possession under a persuasion that the contract was capable of being completed; and, while it remains doubtful whether it cannot still be completed, and whether if it can, the defendant is not still bound by it, I cannot order the purchase-money to be paid into court, by a purchaser who is willing to give up possession."

So in *Wickham v. Evered*,^(b) on a motion that the purchaser should pay the purchase-money into court, he being in possession and having exercised acts of ownership; it was insisted for the purchaser, that by the agreement the money was not to be paid till a good title could be made, and that defendant took possession under the assurance that the title was good; but no good title appeared on the abstract, and the defendant had insisted on the misrepresentation and want of title by his answer: The court said, "the defendant cannot keep possession of the estate and of [*320] his purchase-money too. If he *elect to retain the possession, let the purchase-money be paid in within a month, without prejudice to any question in the cause."

In some cases of this kind, the emergency of the circumstances will be most conveniently met by an order on the purchaser to pay interest,^(c) or by requiring him to pay an occupation rent.

The fact of a necessary party to the conveyance being an infant, will not vary the practice of the court, as to the payment of the purchase-money, where the purchaser is in the possession and ownership of the estate under an agreement. Lord Eldon in a case of this kind, having refused to vary the previous order for the payment of the money into court on the ground of such infancy, said "it is strongly pressed that it is a hardship for a man to wait, perhaps, twenty years for his conveyance, I agree that it is so, but that is the result of unavoidable circumstances, and is not the fault of any body; you cannot keep the estate and the money too."^(d) It seems, however, that this is the only case in which a purchaser, unable to get a complete conveyance of the legal estate from the vendor, will be compelled to part with his purchase-money. And, therefore, where the estate was copyhold limited for life, and then in remainder, and the remainder-man was abroad, not having surrendered, Lord Eldon refused the motion, saying, "that the court would struggle [*321] to get *over an objection to an application of this sort; but if it be coupled with such a circumstance as that some time may elapse before the surrender or conveyance is got, it would hesitate before it made the order. In the case of an infant, the purchaser has no reason to complain; but in this case the court declares nothing upon its records, as in the case of infancy. The non-compliance with the conditions of sale may in this case annul the contract."^(e)

The foundation of the doctrine in these cases being the possession of the purchaser taken under the contract, it is clear that the principle does not distinctly apply, where the circumstances under which possession is taken are such, that it cannot be distinctly referred to the contract; as where the vendor and purchaser are tenants in common, the subject of

^(b) 4 Madd. 52.

^(c) *Gibson v. Clarke*, 1 Ves. & Bea. 500.

^(d) *Bradshaw v. Bradshaw*, 2 Mer. 493.

^(e) *Noel v. Weston*, Coop. 140.

sale being the vendor's moiety of the estate, of which the vendee had been in possession previous to the agreement for purchase,—the court will not order in the purchase-money, except in a case of gross exclusion. In *Freebody v. Perry*,^(f) which arose under these circumstances, the abstract had been delivered, and no objection taken to the title. The purchaser stated by his answer that he had ever since the date and signing of the agreement, as he had for a considerable time previous thereto, been in the possession of the said moiety, and received the rents and profits thereof, but had all along kept an account as between himself and the plaintiff, of *the rents and profits so received, and had at all times been, and then was, ready and willing to account [*322] with the plaintiff for such rents and profits. The Lord Chancellor, on appeal from the Vice Chancellor, thought there was no foundation for the application, and refused the motion. So where a tenant purchases of his landlord, it seems to require a case of considerable misconduct on his part to induce the court to interpose in this way. In a case, however, where the tenant, having article for the purchase, approved the title, and caused a conveyance to be prepared, afterwards refused to complete, insisting on objections to the title by his answer, retaining possession all the time, and when applied to for rent claiming to be purchaser, and when called upon for his purchase-money, claiming to be tenant, he was ordered to pay in the purchase-money within six weeks.^(g)

Where the purchaser is in partial possession, from which, however, he cannot be dislodged, and is in embarrassed circumstances, so that it is very doubtful whether he possess the means of paying the purchase-money into court, a receiver will be appointed, as the only available means of protecting the interests of all parties. Thus, in *Hall v. Jenkinson*,^(h) the answer of the purchaser, admitting that he had partial possession of the premises, but denying that full and complete possession was ever *given to him, and alleging, among other things in support [*323] of this, that a shepherd of the vendor's still continued to reside on the premises, contrary to his wishes, and that he, during such residence, had cut fire-wood, and done other acts of ownership, as the vendor's agent; and the purchaser admitting, also, by his answer, that he was in embarrassed circumstances, that his goods had been taken in execution, and that, to extricate himself from difficulties, he had put up the estate for sale by auction in the preceding November, but no bidders appeared; on a motion, supported by an affidavit, that since the plaintiff had filed his bill he had discovered that the purchaser was insolvent, and that all his real and personal estate (including the estate in question) were to be assigned and conveyed to trustees for the benefit of his creditors, Lord Eldon, on the grounds, "that if the contract could be carried into execution, the vendor had a lien on the estate for the remainder of the purchase-money;—that, if it could not be executed, the purchaser had a lien to the extent of the money paid by him on account of his purchase; that the purchaser was insolvent; that by attempting to sell and convey the estate the title would be embarrassed; and, lastly, that the possession had never been a clear and exclusive possession of the purchaser, but a mixed possession of both,"—granted a receiver.

(f) *Coop.* 91.

(g) *Walters v. Upton*, *Coop.* 93 n.; and see as to *S. P. Bonner v. Johnstone*, 1 *Mer.* 366.

(h) 2 *Ves. & Bea.* 125.

So, where both parties are desirous of divesting themselves of the possession of the property, the court will sometimes grant a receiver: as [*324] in *Boehm v. Wood*,⁽ⁱ⁾ where the property consisted of buildings and offices, on which it would be necessary to effect insurances, and of ornamental grounds which required considerable expenditure and attention,—Lord Eldon, on the motion of the vendor, alleging that all the objections to the title had been answered, but that some time must elapse before the cause could be heard, ordered that a receiver should be appointed, although the purchaser denied that the objections to the title had been answered; his Lordship, however, reserving the consideration of the question, at whose expense the receiver should be.

And, lastly, when there is not a case strong enough to induce the court to order payment of the purchase-money, and where the purchase is of such a nature that the appointment of a receiver would not be a sufficient protection to the plaintiff,—as if the property have from accidental circumstances become greatly depreciated, and the purchaser be likely to leave the country,—the court will interpose by granting a writ of *ne exeat regno*, as the only effectual means of protecting the vendor, and vindicating its own jurisdiction.^(k)

But the court will not grant a writ of *ne exeat regno*, unless it be quite clear that at the hearing it must decree a specific performance. Thus, in *Morris v. McNeil*,^(l) the purchaser had taken possession of the [*325] property, which was the subject of the contract, and had continued possession and received rents after the abstract was delivered: the purchaser who had been for some time resident at Boulogne, had then recently come to England and was about to return to France, when the plaintiff obtained a writ of *ne exeat regno* against him, marked for the amount of the purchase-money. On the motion to discharge the writ, it was contended in support of it, that the title had been accepted by the acts of the defendant; and even if this were not so, yet the court would not presume that a good title could not be made; and that if the writ were discharged the plaintiff would have no remedy, for it would be useless to incur the expense of the proceedings which could never be made effectual; but Lord Eldon was of opinion that these considerations afforded no ground for the writ. “The facts of this case,” said his Lordship, “and the transactions between the parties do not go that length, which authorizes me to say that I cannot have a rational doubt whether there shall or shall not be a specific performance of the contract; and, unless the court can make it out to be quite clear that there must be a specific performance, it cannot grant the writ of *ne exeat regno*. The writ must be discharged.”

It is immaterial for the purpose of an application to have the money paid into court, whether the possession be or be not admitted by the answer.

[*326] It is sufficient *if that fact be brought before the court by affidavit, or admitted at the bar. Thus, in *Burroughs v. Oakley*,^(m) when the plaintiff's bill contained an allegation as to the pur-

(i) 2 Jac. & Walk. 236.

(k) *Boehm v. Wood*, Turn. 332.

(l) 2 Russ. 604; and see *Raynes v. Wise*, 2 Mer. 472.

(m) 1 Mer. 52; and see *Boothby v. Walker*, 1 Madd. 197.

chaser having taken possession, and the answer merely stated the agreement but disputed the title, without admitting possession, on the vendor's affidavit of possession taken, and of a correspondence between him and the purchaser's solicitor, explaining away the objections to the title, and repeatedly calling on the purchaser to take the conveyance which had been prepared, without obtaining any satisfactory answer; Lord Eldon said, "that although there was no case in which the court had acted on affidavit, yet its interference may be justified by the circumstances. In this case the contract seemed in terms to contemplate delay, yet that could only mean reasonable delay, and not such as could arise out of obstacles created by the purchaser himself: and, therefore, that this was a case in which the court would take the purchase-money into its own keeping."

In *Blackmore v. Stace*(*n*) the purchaser being in possession, and having obtained that possession without the consent or privity of the vendor, a motion was made before answer, that the purchaser be ordered to pay his money into court; it was objected that such order could not be made before answer, unless the defendant thought fit to file affidavits, so *as to bring the merits before the court, which in this [*327] case he had not done. Sir J. Leach, in giving judgment, said, "It is not argued on the part of the defendant that the rule is, that as to the question whether a purchaser in possession shall or not pay his purchase-money into court, his answer is to be considered as the only evidence; but merely that the order shall not be made before answer, unless the defendant thinks fit to submit the merits of the case to the court by affidavit. But if the case may be made against such a defendant by affidavit, it is difficult to find a principle why the plaintiff is to wait for this relief until the defendant thinks fit to put in an answer, or why an option should be given to such a defendant to meet, or to decline to meet, the case by affidavit. Neither can I find any authority for this proposition on the part of the defendant. In *Burroughs v. Oakley*(*o*) the defendant had put in an answer in the suit, but no answer as to the object of the motion; for the fact of the possession of the defendant was not even stated in the bill, but was brought before the court by affidavit. In *Dixon v. Astley*(*p*) there was no answer; and no such point was made. In *Bonner v. Johnstone*(*q*) the Lord Chancellor declined to make the order; not because the defendant had not answered, but because the defendant was in possession as tenant at the time he entered into the contract of purchase, and his possession, therefore, not being derived from his character *of purchaser, formed no sufficient reason [*328] why he should not retain his money until the contract was completed. Here the defendant, in his character of purchaser, obtains the possession from the vendor's tenant, without the consent or privity of the vendor, and it is not reasonable that he should retain both the land, and the price of the land. He must pay his money into court."(*r*)

In general, however, the court will not grant the application before answer; nor, probably, in any case, unless where the purchaser has been guilty of unreasonable delay, and there have been clear acts of ownership.

(*n*) 6 Madd. 69.

(*o*) 1 Meriv. 52.

(*p*) 1 Meriv. 133.

(*q*) 1 Meriv. 366.

(*r*) That a purchaser demurring to a bill for specific performance may nevertheless be ordered to pay his purchase-money into court, see *Butler v. Boughton*, 3 Madd. 95.

Where these acts have been committed, after the purchaser became aware of the state of the title, acts of a much slighter character will be sufficient to induce the court to act;(s) as in *Dixon v. Astley*, where it appeared that the timber charged to have been cut down amounted to no more than an old ash tree (represented to have been very ornamental,) and a cherry-tree, and certain coppice-wood, cut and sold, which, however, it appeared had arrived at maturity; yet Lord Eldon thought them sufficient to call for the interposition of the court, and accordingly ordered in the purchase-money.

After a contract for the purchase of an estate, the estate, in equity, belongs to the purchaser, the vendor being a trustee of the legal estate, [*329] the purchaser a *trustee of the purchase-money. If a conveyance of an estate be made to A, the purchase-money being paid by B, then A is, in equity, a trustee of the estate for B; on the same principle, if the vendor convey the legal estate to the purchaser "prematurely,"—to use Sir Thomas Clarke's expression,—that is to say before the purchase-money has been paid, the purchaser is a trustee of the estate for the vendor for the whole, or the residue of the purchase-money, according as the case may be. In other words to the extent of unpaid purchase-money, the vendor has a charge, or lien, as it is commonly called, upon the estate.

The doctrine in this simple case is perfectly clear, and admits of no misconception. Suppose, however, the purchaser pays part of the money, giving a note for the residue, which when payable is dishonoured, or a bond which is never discharged, a question then arises whether he has a lien on the estate for the amount, or whether he is left to the mere personal security afforded by the note or bond. With respect to the effect of a promissory note, it has been long settled that it is to be considered merely as a mode of payment, and that if the note be dishonoured the vendor's lien remains.(t) It makes no difference that the note has been negotiated,(u) or that the purchaser gives an acceptance by himself and a third *person, or by a third person [*330] alone. Thus in *Grant v. Mills*,(v) John Ogle having entered into an agreement to purchase a freehold estate from the plaintiff, by indentures of lease and release, dated the 20th and 21st April, 1804, in consideration of £3500 by Ogle paid as therein mentioned, the estate was conveyed to Ogle in fee. The consideration was not in point of fact paid *pecuniis numeratis* but by bills drawn by Ogle at different dates, and accepted by him and his partner Walton, payable to the plaintiff's order. Ogle soon afterwards sold the estate for £3500 to the defendant Mills, but of that sum only £1199 had been paid by him on the first of June, when Ogle and Walton became bankrupt. A bill was filed insisting that the plaintiff was entitled to the sum of £2301 remaining unpaid by Mills, with interest at 5 *per cent.*, prayed a declaration accordingly, or

(s) 1 Mer. 134; and see *Bonner v. Johnston*, 1 Mer. 379.

(t) *Gibbons v. Baddall*, 2 Eq. Ca. Ab. 682. n. (b) to (D); *ex parte Peake*, 1 Madd. 346. And see *Oxenham v. Esdaile*, 3 You. & Jerv. 262.

(u) *Ex parte Loaring*, 2 Rose, 79, where Lord Eldon expresses a wish "that this species of lien had never subsisted."

(v) 2 Ves. and Bea. 306.

otherwise that the same might be paid by Mills towards payment of the bills of exchange. The Master of the Rolls, Sir William Grant, observed as follows:—"it is said that by taking bills accepted by the partnership, in which the purchaser was a partner, the vendor has got the security of a third person, viz. the other partner, which must be considered as a substitution for the lien. What may be the effect of a security, properly so denominated, of a third person, has never I believe been absolutely determined; but I perfectly concur in the opinion expressed by Lord Redesdale, in *Hughes v. Kearney*,^(w) that *Bills of Exchange are to be considered not as a security, but merely [*331] as a mode of payment. That is obvious from attending to the nature of a Bill of Exchange. It is an order by the drawer for the payment of money, which he has in the hands of the drawee, to the holder of that bill. The acceptor, by his acceptance, acknowledges that he has money belonging to the drawer in his hands; and engages to have that money forthcoming, according to the requisition of the bill. The acceptor is never considered as a surety for the debt of another. By accepting he admits himself to be a debtor to the drawer. The subject of the bill is, in contemplation of law, the drawer's own money, which he authorizes the creditor to receive, instead of receiving it himself, and afterwards handing it over to such creditor. My opinion is clearly that there is no waiver of the lien by taking bills, and therefore the plaintiff is entitled to whatever part of the purchase-money remains in the hands of Mills. If there is any dispute as to the amount, it must be ascertained by reference to the Master."

With respect, however, to a bond, it was held by Lord Bathurst, in *Fawell v. Heelis*,^(x) that though it was not actually paid, yet the vendor had by taking it departed with his lien. It is needless to examine into the ground of his Lordship's decision, as it has never been mentioned without observations impeaching its soundness, and has long been virtually over-ruled; *it being now clearly settled, that the vendor taking a bond or covenant, does not discharge his [*332] lien.^(y)

There is a class of cases where the purchaser gives a collateral security, paying, for instance, part of the money, and giving a mortgage on another estate for the residue. If the mortgage security should ultimately become deficient, does the vendor retain his lien on the estate sold for the deficiency? It seems at one time to have been thought that the lien was gone. In *Nairn v. Prowse*,^(z) Sir William Grant, after adverting to the effect of a note or bond, proceeds thus—"but if the security be totally distinct and independent, will it not then become a case of substitution for the lien instead of a credit given because of the lien? Suppose a mortgage was made upon another estate of the ven-

(w) 1 Sch. & Lef. 136.

(x) Amb. 724.

(y) *Mackreth v. Symmons*, 15 Ves. 337, 338, where the cases establishing the point are collected and commented on by Lord Eldon. And see *Saunders v. Leslie*, (2 Ball. & Bea. 514,) where Lord Manners held, that a bond given by the owner of an estate to a person entitled to the benefit of a charge upon it, was no waiver of the charge, and that in such a case the *onus probandi* lies upon the owner of the estate, not on the person entitled to the charge.

(z) 6 Ves. 760.

dee, will equity at the same time give him what is in effect a mortgage upon the estate he sold, the obvious intention of burthening one estate, being that the other shall remain free and unincumbered? Though in that case the vendor would be a creditor if the mortgage proved deficient, yet he would not be a creditor by lien upon the estate he had conveyed away."

[*333] Assuming the truth of this principle, he proceeded *to apply and act upon it on the circumstances of the case before him. The facts, so far as they bear upon this question were as follows:—Michell, one of the defendants, was seised in fee of estates in Somersetshire, and possessed of leasehold premises for terms of 99 years, determinable on lives, and by indenture dated the 5th June, 1795, Michell agreed to convey to Maurice Lloyd, his heirs, executors, &c., the said estate, on, or before, the 24th June instant, and Lloyd agreed that in consideration of such conveyance, he would on or before the said 24th June, transfer into the name of the said defendants so much long annuities as would produce the sum of £100 *per annum*, with the dividends due thereon; and in case the average selling price of long annuities should not rise within two years, so that the stock so to be transferred might be sold for £2,200, Lloyd, his executors, &c., would pay to the defendant the sum of £2,200, on receiving from him a re-transfer of the said annuities; provided it should be at the option of Lloyd at any time, within the two years, to pay defendant so much money as with the then selling price of such long annuities, would produce £2,200. The estates were conveyed and assigned accordingly, and a receipt for the consideration money endorsed on the back of the conveyance of the freehold estates, and the title deeds were delivered to Lloyd. By an indenture, dated the 31st July, 1795, reciting the articles of the 5th June, and the conveyance, and that Lloyd had transferred the long annuities,

[*334] *he covenanted, according to the provisions of the former articles, that in case the average price of the long annuities should not rise within two years so that the stock so transferred might be sold for £2,200, he would pay the £2,200 on receiving a transfer of the annuities, subject nevertheless to a proviso empowering Lloyd to demand from the defendant a transfer of the said annuities, on payment of the £2,200 to him; and the defendant covenanted to transfer on payment of that sum. Lloyd did not, during his life, propose to pay the £2,200, and the stock did not rise within the two years, so that it could not be sold for that sum. Lloyd died insolvent, having previously mortgaged these estates to Nairn for £2,000. Shortly after Lloyd's death, Michell sold the long annuities for £1,481, and now claimed a lien on the estate for the residue of the purchase-money. The question was, whether having taken a security for the purchase-money of the estate he sold to Lloyd, he could have a lien on the estate as vendor? Sir W. Grant, after laying down the doctrine already cited, with regard to the effect of a collateral mortgage security, and applying it to this case, held that the lien was gone. Having assumed, in conformity with this *dictum* that taking a collateral mortgage-security for part of the purchase-money, would extinguish the lien, he reasons this case as follows: "the same rule must hold with regard to any other pledge for the purchase-money. In this case, the vendor trusts to no personal security of the

vendee, but gets possession *of a long annuity of £100 a-year, which, according to the rise or fall of stock, might or [*335] might not be sufficient for the purchase-money. He has, therefore, an absolute security in his hands, not the personal security of the vendee. Could the vendee have any motives for parting with his stock, but to have the absolute dominion over the land? It is impossible it could be intended that he should have this double security, an equitable mortgage and a pledge, which latter, if the stock should rise a little, would be amply sufficient to answer the purchase-money."

Lord Eldon* has very justly observed,(a) that "in the case of *Bond v. Kent*,(b) where the estate sold was mortgaged for part of the money, and a note taken for the rest," there was strong negative evidence that the vendor was not intended to be a mortgagee for the rest. The case put by the Master of the Rolls in *Nairn v. Prowse*,(c) of a mortgage upon another estate, also afforded strong, perhaps not quite conclusive, evidence against the lien; considering the value of the mortgaged estate, in general much more than the amount of the money. It does not, however, appear to me a violent conclusion as between vendor and vendee, that, notwithstanding a mortgage, the lien should subsist. The principle has been carried this length, that the lien exists; *unless an intention, and a manifest intention, that it shall [*336] not exist, appears."

According to this reasoning, the effect of granting a mortgage on another estate has not, necessarily, that effect which Sir W. Grant has ascribed to it,—and as his decision in *Nairn v. Prowse* goes entirely upon the assumption of that principle, it is not quite clear, perhaps, that it is sustainable. The true question in that case would have been, whether it was the intention of the vendor to accept the long annuities absolutely in lieu of the purchase-money, or to take them merely as a mode of payment to the extent of their value, considering that he was still entitled to have the deficiency made good? On a careful consideration of the facts there will be found to be no inconsiderable ground for thinking the latter to be the true inference from the circumstances of the case, and if so, it may be very questionable whether Sir W. Grant came to a right conclusion. That Lord Eldon would have come to a different conclusion upon this case is sufficiently obvious, from the language he has used in respect of it in various places, but particularly in *Mackreth v. Symmons*. Speaking with reference to Sir W. Grant's judgment, he there observes that "it must not be understood that a mortgage taken, is to be considered as conclusive ground for the inference, that a lien was not intended, as I could put many instances that the mortgage of another estate for the purchase-money, *would not be decisive evidence of an intention to give up the lien; though in the ordinary case a man has always greater security for his money upon a mortgage, than value for his money upon a purchase; and the question must be whether under the circumstances of that particular case, attending to the worth of that very mortgage, the inference arises. In the instance of a pledge of stock, does it necessarily follow, that the vendor consulting the convenience of the purchaser, by permitting him to have

(a) *Mackreth v. Symmons*, 15 Ves. 340.

(b) 2 Vern. 281.

(c) 6 Ves. 760.

the chance of the benefit, therefore gives up the lien which he has? Under all the circumstances of that case the judgment of the Master of the Rolls was satisfied that the conclusion did follow; but the doctrine as to taking a mortgage or a pledge, would be carried too far if it is understood as applicable to all cases, that a man taking one pledge therefore necessarily gives up another, which must I think be laid down upon the circumstances of each case rather than universally."

It is scarcely necessary to add, that Lord Eldon has in these observations, clearly intimated the weak points of Sir W. Grant's argument, namely—first, the assumption of a principle which is no where established; and, secondly, a conclusion of fact imperfectly, if not erroneously, drawn from the circumstances of the case.

The nature of the vendor's lien was certainly not at that day understood in the same light in which it is now viewed. It seems to have [*338] been thought that the nature of the security was the *criterion whether the lien was abandoned? And, on this principle, a promissory note, being so manifestly a mere mode of payment, was held not to be so. A bond, however, being not so obviously a mere mode of payment, was placed by Lord Bathurst in the other category, and considered as offering conclusive evidence of the abandonment of the lien. This, by degrees, was discovered not to be so clear a point, as it had originally been thought, and before the case of *Nairn v. Prowse*, which we have been considering, it was abandoned. In that case the court went a step farther, and it was boldly laid down, that, though a bond could not be deemed conclusive evidence of abandonment, at all events a mortgage security on another estate would be so. Lord Eldon, as we have seen, put an end to, or, at all events, threw considerable doubts on this notion in *Mackreth v. Symmons*, and at length it may now be stated as the true doctrine, that whether the lien be, or be not, abandoned is a question of fact depending on the intention of the parties, and not on the form of the instrument, or the mode by which the unpaid purchase-money is secured;—that neither a note or a collateral mortgage security is in itself conclusive evidence of the abandonment, —that a note may be as complete an abandonment, as a mortgage,—but that whether the one or the other be so, is a mere question of intention between the parties, to be collected from the nature of the transaction, [*339] and the circumstances of the case. It is, in short, a mere *matter of contract, and it lies on the purchaser to show that the vendor, by accepting a note, a bond, or a collateral security, meant thereby to abandon his equitable lien on the estate,—on the ground that this equitable lien results from a principle of law, the benefit of which can only be waived by an agreement for that purpose, it being for the purchaser, in the absence of any written stipulation, to educe from the circumstances clear demonstration that there was such an agreement.(d)

In *Capper v. Spottiswoode*,(e) part of the purchase-money was paid, and the residue secured by the bond of the purchaser and a re-conveyance of part of the estate. The nature of this transaction certainly leads very strongly to the inference, that the vendor meant to rely upon the bond, and the mortgage for the unpaid part of the purchase-money: the

(d) *Hughes v. Kearney*, 1 Sch. & Lef. 135.

(e) *Taml. Rep.* 21.

presumption may be considered so strong that it ought not to be rebutted by any thing short of direct evidence; and Sir J. Leach accordingly held that the vendor was not entitled to a lien on the whole estate.

Where a purchaser dies before the completion of the contract, and before the whole of the purchase-money has been paid, the court will not decree that he has a lien on the estate for the purchase-money unpaid, but will direct a reference to take an account of the personal estate of the purchaser, and to ascertain *the clear residue of it applicable [*340] to the payment of the purchase-money, with a declaration, that if it be insufficient, the vendor shall be entitled to a lien to the extent of this deficiency. (f)

The difficulties growing out of the state of the law on this subject are well illustrated by the contradictory decisions made on the successive re-hearings in the late case of *Winter v. Lord Anson*. (g) Winter being seised of certain freehold and copyhold estates in Somersetshire, by articles dated the 16th of June, 1814, agreed to convey and surrender the same to Mousley, in fee, free from all incumbrances; and Mousley agreed to pay to Winter, on the 29th September, then next ensuing, and on the execution of the conveyance, and completion of the surrender, the sum of £75 per acre, the quantity to be ascertained by a person therein named: and it was further agreed—"That the amount of such consideration-money shall be secured by the bond of the said William Mousley unto the said William Winter, with interest at £4 per cent. per annum, and shall remain so secured during the life of the said William Winter, on the regular payment of such interest as aforesaid." *The purchase-money was found to amount to £1,485, being £576 [*341] for the freehold, and £909 for the copyhold. The freehold part was duly conveyed by indentures of lease and release of the 28th and 29th September, in consideration of £576, therein expressed to be paid, and a receipt for the amount indorsed on the release. On the 1st October following the copyholds were surrendered to Mousley in fee simple, and the surrender was expressed to be in consideration of £909, paid by Mousley to Winter, the receipt whereof Winter thereby acknowledged. The sum of £485 was the only part of the purchase-money actually paid; Mousley giving a bond for the payment of £1,000, the residue thereof, within twelve months after Winter's decease, with interest. Mousley was let into possession, and after mortgaging the estate, became bankrupt, and the estate was sold by the assignees to Lord Anson, who was allowed to retain £1,200 as an indemnity against the lien which Winter claimed. On a bill filed by Winter against the bankrupt, his assignees, and Lord Anson, it was at the hearing referred to the Master, to enquire Whether it had been agreed between Winter and Mousley, that Winter should accept the bond in payment of so much of the purchase-money, and that there should be no lien upon the estate in respect of it? The Master, by his Report, stated that he found no such agreement, but he

(f) *Topham v. Constantine*, Taml. Rep. '35.

(g) On the first hearing it was decided that the vendor's lien was a subsisting charge, (Sir Edward Sugden's *Vend. and Purch.* p. 552, n. 8th ed. :) on a re-hearing, the substance of which is stated in the text, it was decided the other way, and the lien was held not to exist, (1 Sim. and Stu. 434.) On appeal to Lord Eldon, this decision was reversed, from which reversal there was an appeal to the Lords, which I have been informed was ultimately withdrawn.

found by the depositions of one of the witnesses, taken on cross-interrogatories on the part of the defendants, being the party who proposed the agreement, as Winter's attorney; *that in or about a week [*342] after the agreement, bearing date the 16th June, 1814, had been made, and previously to the execution of the said bond, he, in conversation with the said William Winter, pointed out to him the imprudence of trusting to the personal security alone of the said William Mousley for the payment of the said purchase-money. And the said Francis Sharrett told the said William Winter that he the said Francis Sharrett knew that the said William Mousley was concerned in extensive trade and speculations, and had borrowed money. And the said Francis Sharrett strongly urged the said William Winter to have a mortgage for the purchase-money, and told him that he the said Francis Sharrett thought there would be considerable danger in taking a bond only; but the said William Winter replied that the bond would be a sufficient security, and that he had no doubt if the said William Mousley outlived him, the bond would be paid; and that he should be satisfied to take the said William Mousley's personal security." Upon this state of facts Sir J. Leach, V. C., held that the lien was discharged, on grounds the soundness of which, as will appear on examination, are questionable. "In ordinary cases," said His Honour, "where the conveyance expresses contrary to the fact that the purchase-money is paid, there, though the estate passes at law by the conveyance, it does not pass in equity until the actual payment of the price; until the vendor has received that consideration for which it appears by the deed he contracted to part with [*343] his estate. Suppose it *had been expressed in this conveyance, that the price was not to be paid until the death of the vendor, and there had been a covenant on the part of the purchaser then to pay the amount, and to pay the interest in the mean time, could it then have been said that it appeared by this deed that the vendor had contracted not to part with his estate until the actual payment of the price? Would it not rather have been the true effect of the language of the conveyance in such case, that the vendor had contracted to part with his estate presently; not in consideration of the actual immediate payment of the price, but in consideration of the covenant for the future payment of that sum with interim interest, and that having therefore the covenant, which was the consideration bargained for, the estate must pass by the conveyance in equity as well as at law. Now although it is not expressed in this conveyance, that the price was not to be paid until the death of the vendor, yet such was in fact the actual agreement, and substantial dealing of the parties, and the language of the conveyance to the contrary is the mere result of the common form; and the question comes to this, whether the court is concluded by the form of the deed from entering into the truth of the case. If the language of the deed is to prevail in this case, then the price is to be taken as actually paid, for so it is expressed in the deed. It is the vendor, therefore, who in the first place attempts to raise an equity against the allegations of the deed; [*344] and if the vendor be permitted to repel the effect of the deed, by *showing that the price was not paid, it must necessarily follow that the vendee must be at liberty to disclose the whole truth, and to explain the reason why that payment was not paid. I consider, therefore, that the case is in principle the same as if the conveyance had

stated the real contract of the parties, and that by the effect of that contract, the vendor agreed to part with his estate, in consideration of the bond for the future payment of the price; and that when such bond was executed, the estate passed to the vendee in equity as well as at law."

It will be at once remarked that this judgment assumes the very fact, upon which the question turns,—it being taken for granted, that the real contract was an agreement by the vendor to part with the estate, in consideration of the bond for the future payment of the price. If this were so, it requires not the ingenious reasoning which is here advanced, to lead to the conclusion at which His Honour arrived, for it follows as matter of course. It is submitted that, the real question in this case was, Whether from the dealing between the parties, such an agreement could be conclusively implied? The Master states in his report that he found no express agreement. He then proceeds to state the substance of a conversation between the vendor and his solicitor previous to the execution of the bond, leaving it to the court to draw the inference; and it would seem, that the only point which the court had to consider was, whether this conversation implied an intention on the part of the *vendor to waive his lien? If so, the lien was gone, other- [*345] wise not. This point, however, the court did not touch. Whether in point of fact, the decree was right or wrong, is a matter upon which it is unnecessary to express any opinion. Upon appeal, however, to Lord Eldon, the decision was reversed, and from that there was an appeal to the House of Lords, which was ultimately withdrawn, leaving, therefore, the reversal of Sir J. Leach's judgment, as the sound law to be inferred from the circumstances of this case.

The vendor's lien extends to all persons claiming under him with notice that the money was not paid.^(h) Lord Eldon, after stating this point to be clearly settled,⁽ⁱ⁾ proceeds thus—"I do not hesitate to say, that if I had found no authority that the lien would attach upon a third person having notice, I should have had no difficulty in deciding that upon principle, as I cannot perceive the difference between this species of lien, and other equities, by which third persons having notice are bound. In the case of a conveyance to B., the money being paid by A., B. is a trustee, and C. taking from him, and having notice of the payment by A., would also be a trustee."

Whether the vendor's lien shall prevail for the benefit of third persons; in other words, whether it shall be marshalled for the benefit of creditors or *legatees for instance, was formerly a question much discussed, and, owing to certain contradictory decisions and [*346] *dicta*, was involved in great obscurity and uncertainty;^(k) but the general

(h) *Elliot v. Edwards*, 3 Bos. and Pull. 181. (i) *Mackreth v. Symmons*, 15 Ves. 349.

(k) A concise statement of the leading cases on the point may not be altogether useless. The first leading authority on the subject of marshalling, is *Coppin v. Coppin*, (3 P. W. 391.) There the purchased estate was not devised by the purchaser, but descended to his heir, and the question was between the heir and legatees, and the court refused to marshal the assets in their favour,—a decision with respect to which Lord Eldon, (*Mackreth v. Symmons*, 15 Ves. 344,) has said that in it "the doctrine of *Pollexfen v. Moore*, as to marshalling, was practically, though I doubt whether it ought to have been, admitted."

In *Pollexfen v. Moore*, (3 Atk. 272,) Lord Hardwicke is reported to have stated, that the

[*347] and obvious leaning *of judges of late years, and the recent decision of Sir J. Leach, in *Selby v. Selby*,⁽¹⁾ in conformity with that leaning, have at length set the question *virtually at rest. In that case Thos. Selby had, in his life-time, contracted to purchase certain tithes for the sum of £900, and had thereupon paid the sum of £90 by way of deposit. The purchase was not completed at the time of his death, but was afterwards completed under an order of the court made in this suit, and the remainder of his purchase-money was paid out of his personal estate. The testator had made his will prior to the contract, whereby he devised all his real estates in manner therein mentioned, and after the making of the contract he republished his will, so that his equitable interest in the purchased tithes passed thereby. The question was, Whether, there being a deficiency of the testator's personal estate to pay his simple contract debts, the assets were so to be marshalled that to the extent to which the personal estate had been applied in payment of the residue of the purchase-money for the tithes, the simple contract creditors were entitled to the advantage of the lien which the vendor of the tithe had upon the property so contracted to be sold by him? Sir John Leach, after a very clear examination of the cases on the subject, held that the vendor's equity ought to be mar-

lien of a vendor does not prevail for the benefit of a third person; yet his decree was, that a legatee in that case was entitled to the benefit of such lien. Many attempts have been made to reconcile his *dictum* with the decree, but none of them with any great success; Sir Edward Sugden's is probably the most ingenious (*Vend. and Purch.* 560, 8th ed.,) but his explanation and the "important distinction" he derives from it, (*ibid.* p. 563,) are equally untenable, and deserving of consideration only for their ingenuity. In reference to this case, Sir W. Grant, in *Trimmer v. Bayne*, (9 Ves. 211,) says, "that is a very obscure report, and it has perplexed me very much formerly." In *Mackreth v. Symmons*, (15 Ves. 345,) Lord Eldon observes, "that if Lord Hardwicke's meaning be, that he should follow the case of *Coppin v. Coppin*, and that if the vendor exhausts the personal assets, the legatee of the purchaser should not come upon the estate, there is great difficulty in applying the principle, as it would then be in the power of the vendor to administer the assets as he pleases,—having a lien upon the real estate, to exhaust the personal assets and disappoint the creditors, who if he had resorted to his lien, would have been satisfied, and in that case with reference to the principle, the case is anomalous." In the last case, *Selby v. Selby*, (9 Russ. 338,) Sir J. Leach says, "many observations have in subsequent cases been made, with a view to reconcile the *dictum* and decree of Lord Hardwicke, but I must admit without success."

In the case of *Trimmer v. Bayne*, (9 Ves. 209,) Sir W. Grant, after referring to the *dictum* of Lord Hardwicke, and stating that he had been much perplexed by that case, comes to a conclusion directly opposed to it, and expressly states that the lien of a purchaser is within the common principle of marshalling assets; that a person having power to resort to two funds, shall not by his election disappoint another, having one fund only. The purchased estate in that case had descended to the heir, and the contest was between him and the legatees. (4 Russ. 339, n.)

The case of *Headley v. Redhead*, (Coop. 50,) is very imperfectly reported; it was, however, the case of a devise of the purchased estate, and it appears that Sir William Grant meant to confirm the general principle as to marshalling, which he had stated in *Trimmer v. Bayne*. In *Austen v. Halsey*, (6 Ves. 475,) an estate contracted to be purchased was devised, and a question was made whether the legatees would, to the extent of the vendor's lien, be paid out of the purchased estate. Lord Eldon is reported to have stated "that the cases of marshalling seem to have gone this length, that where there is a charge upon an estate descended, a legatee shall stand in the place of a person having that charge, and resorting to the personal estate; but that there was a difference in marshalling between an estate descended, and an estate devised, and that it might be found difficult for the legatees to work out their payment by that circuity." In that case, however, there turned out to be a personal fund for payment of the legacy, and Lord Eldon expressly disclaimed giving his opinion upon the point.

(1) 4 Russ. 336.

shall in favour of the creditors: "I confess," said his Honour, "I am unable to discover upon what principle Lord Hardwicke's *dictum*, that the lien of a vendor is not to prevail for the benefit of a third person, is to be supported,—why, in this case alone, an exception is to be made to the equitable rule, that he who has power to resort to two funds shall not, by his election, *altogether disappoint another person [*349] who has power to resort to one fund only? I concur entirely, therefore, with the expressed opinion of Sir Wm. Grant, in *Trimmer v. Bayne*; and it may fairly be observed, that what Lord Eldon has stated in *Austen v. Halsey* affords the inference, that the vendor's lien is subject to the general principle of marshalling. Here the question is between devisees of the purchased estate and simple contract creditors, and the established rule being that simple contract creditors are, as against a devisee, to stand in the place of specialty creditors who have exhausted the personal assets, because the specialty creditors had the two funds of real and personal estate to resort to,—so the simple contract creditors here are entitled to stand in the place of the vendor against the devisees, because the vendor has equally a charge upon the double fund of real and personal estate."

This decision, it will be observed, extends only to the right of creditors to have the vendor's lien marshalled, and leaves undecided the question as to legatees having a similar right. Nevertheless it is to be remarked that the leaning of the Learned Judge who decided this point seems strongly in favour of the existence of such a right, observing at the conclusion of his judgment, "that if the charge of the vendor is to be considered in the same manner as if it were secured by mortgage, then a pecuniary legatee would have the same benefit from the vendor's lien; it being now the settled law of the court, that if the *real [*250] estate devised be subject to a mortgage, and the mortgagee exhaust the personal assets, a pecuniary legatee shall stand in the place of the mortgagee upon the devised estate. The present case, however, does not call for a decision on that point." Having regard to this consideration,—to the general current of the *dicta*,—to the fact that there is no principle or reason in support of the creditor's right to have the vendor's lien marshalled, which is not equally applicable to legatees,—it may be submitted as tolerably certain, that whenever the point comes directly before the court, it will be decided that the legatees, in respect of marshalling the vendor's lien, stand in the same situation as creditors.

It is a settled principle that assets shall not be marshalled in favour of a charity. It follows, therefore, that the vendor's lien will not be marshalled for this purpose. If direct authority be wanting, it will probably be found that a decision of the point is involved in the judgment of Sir J. Leach, in *Harrison v. Harrison*.(m)

(3) *Of Costs.*

Costs at law abide the event of the action. This, though *prima facie* the rule also in equity, is subject at all times to be modified by the discretion of the court according to the circumstances of the case; therefore

(m) 1 Russ. & Mylne, 71; S. C. Tamlyn's Rep. 273.

[*351] "the title, in a suit for specific performance, *being bad, only makes a *prima facie* case for costs, in many cases circumstances outweigh that."⁽ⁿ⁾ And Lord Eldon, adverting to the same question in *Vancouver v. Bliss*,^(o) says, "as to the question of costs upon a suit in equity for the specific performance of an agreement, if there is any rule, that the person who fails shall pay costs, it is new to me. I think, in such a suit he who fails is *prima facie*, to be taken to be the person liable to costs upon principles both of morality and justice; and those parties, who depend upon circumstances to govern the discretion of the court in withholding the costs, have it imposed upon them to show the existence of those circumstances in a sufficient degree to cut down the *prima facie* claim of costs."

A rule so general in its terms leaves the question of costs almost entirely in the breast of the court; and the consequence is as might have been anticipated, that out of the variety of decisions which is to be found on the subject, it is not very easy to extract clear and determinate rules.

In *Seton v. Slade*,^(p) Lord Eldon observes, that where the party has not been able to make his title before the decree, it is always a question very important as to costs; a *dictum* which, under the recent decisions, has at length expanded into the rule, that if the vendor has not made a

[*352] good title at the time of filing the bill, he must pay the costs up *to the time when he makes a good title, and the purchaser those incurred subsequently.^(q)

Subject to this general rule it will be convenient to consider the cases under three divisions:—First, those in which the vendor has been made to pay costs: Second, those in which the purchaser has been made to pay them; and Third, those in which each party has been left to pay his own costs.

1st. Where the vendor has to pay costs;—

Where a vendor, by his misrepresentation, or even by a mere accidental mis-statement, renders the suit necessary, he will have to pay the costs. As where a will, forming a link in the title, was alleged to have been proved, although in fact it had not, and the purchaser filed a bill, praying either that the defendants might be decreed to prove the will, or that it should be deposited with the Master for safe custody, and it appeared afterwards that there were only two other persons interested in the will, who did not object to it, and consequently the suit became unnecessary, yet Sir W. Grant, though he seems to have thought that the mis-statement of the vendors was a mere mistake, and unintentional, decreed them to pay the costs of the suit.^(r)

In *M'Queen v. Farquhar*,^(s) the plaintiff, the vendor, having contended unsuccessfully at the *hearing, that the defendant had waived
[*353] all objection to the title by an attempt to re-sell the estate by auction, the title was referred to the Master; various objections were taken to it, all of which were, after a severe contest, overruled; Lord Eldon refused to give costs, because the vendor had contended, on a grave ground, but unsuccessfully upon the evidence, that the acts of the defend-

(n) Per Sir W. Grant, in *Edwards v. Harvey*, Coop. 41.

(o) 11 Ves. 463

(p) 7 Ves. 279.

(q) *Harford v. Purrier*, 1 Madd. 538; *Jones v. Madd.* 4 Russ. 119; *Wilson v. Allen*, 1 Jac. & Walk. 623.

(r) *Harrison v. Coppard*, 2 Cox, 318.

(s) 11 Ves. 467.

ant amounted to an acceptance of the title; but said that if the question had been no more than a mere question of title, he should act hardly by the defendant by not giving the title the credit of making him pay the costs; for it would help the title.

Though the vendors be trustees for sale, yet that makes no difference, and they must pay the costs if they fail in making a good title.(t)

Costs will be given to a purchaser where the vendor succeeds in establishing his title before the Master, after contest, on grounds different from those shown by the abstract.(u) In — v. Collinge(v) the vendor succeeded in making out his title before the Master; but, as it was not clear on the abstract delivered before the bill filed, the decree for specific performance was made without costs, on the authority of the last mentioned case. So in *Wilson v. Clapham*,(w) the title, upon the abstract delivered, being so far unsatisfactory as to require a second *reference and further evidence, no costs were given. So [*354] in *Mortimer v. Orchard*,(x) the vendor having, upon admissions in the answer, allowed specific performance of an agreement, different from that stated in the bill, was ordered to pay the costs.

When the purchase is under a decree, and the Master reports against the title, the purchaser will be paid his costs out of the funds in the cause.(y) If there be no funds in the cause the plaintiff in the cause will be ordered to pay them, without prejudice to the question how such costs shall be ultimately satisfied.(z) Where, however, a purchaser is discharged from his purchase, in consequence of an error in the decree being shown, it is not decided whether he shall have his costs. The point was agitated in *Lechmere v. Brasier*,(a) where Lord Eldon said, "as to costs, the general rule is, that the suitor must pay for the mistakes of the court. It is true the purchaser was not a party to the suit, but still the other parties have been misled by the court: they have been acting on its judgment, and it requires consideration whether they should be made to pay the costs." The purchaser, however, consented to give up the costs on being discharged from the purchase, and so it was not necessary to decide the point.

In *Williams v. Edwards*(b) it was agreed by the *articles, [*355] that if the vendor's counsel should be of opinion that a marketable title could not be made before the time appointed for the completion of the purchase, the agreement should be void, and be delivered up to be cancelled. On examining the abstract it was found, that a title could not be made to part of the property. The purchaser filed a bill for specific performance, with compensation; the bill was dismissed with costs, on the ground of the purchaser having sought to enforce a contract which he had himself agreed should, under the circumstances which had actually happened, be void.

In *Burton v. Todd*,(c) which was a cause and cross cause, the vendors, defendants in the second suit, were ordered to pay the costs of

(t) *Edwards v. Harvy*, Coop. 40.

(u) *Fielder v. Higginson*, 3 Ves. & Bea. 143.

(v) *Ibid.* in n.

(x) 2 Ves. jun. 243.

(z) *Smith v. Nelson*, 2 Sim. & Stu. 557.

(a) 2 Jac. & Walk. 232.

(c) 1 Swanst. 255, the circumstance of which are stated, *ant.* p. 300.

(w) 1 Jac. & Walk. 36.

(y) *Reynolds v. Blake*, 2 Sim. & Stu. 117.

(b) 2 Sim. 78.

both suits, both of them having been rendered necessary by their own conduct: Sir T. Plumer, M. R., said "the costs of both suits must be paid by the defendants in the second suit. The original bill must be dismissed with costs, because the vendors, apprised of the objections, instituted a premature and improper suit, omitting to provide the only proper mode of settling the question. As to the second suit, the vendors took no steps to amend the original bill, and adapt it to the purpose of obviating the objections to the title. Mr. Todd had therefore no means of obtaining a specific performance of the agreement, but by the institution of the second suit. The vendors opposed his claim without [*356] success, and a specific performance *was decreed. There was no inconsistency on the part of Mr. Todd. The provisions of the will rendered it necessary that the accounts should be taken, a proceeding in which all the parties to the second suit were interested. The vendors must be at the expense of clearing the title by taking the accounts, and, therefore, Mr. Todd is entitled also to the costs of the second suit."

In *Mackrell v. Hunt*,(d) the purchaser was allowed his costs of a suit to perpetuate testimony to the due execution of a will upon which the title depended, although the bill was dismissed, the suit, under the circumstances, not being unreasonable.

2nd. Where the purchaser pays the costs:—

In general, where the conduct of the purchaser has been, fraudulent and dishonest on the one hand, or, on the other, vexatious and unreasonable, he will be made to pay the costs. Thus in *Davis v. Symonds*,(e) where the plaintiff dishonestly insisted on the specific performance of an agreement, in which his name was inserted as a purchaser, although it was only intended that he should hold the property as a security, the bill was dismissed with costs, on the ground of his dishonourable conduct. So in *Biscoe v. Wilks*,(f) the defendant, the purchaser, objecting to the title, an accurate note of Lord Eldon's judgment, decreeing specific performance in another case, in [*357] *which precisely the same objection had been raised, was served upon him, but, notwithstanding, he refused to complete. A bill was therefore filed and specific performance decreed against him with costs. In *Maling v. Hill*,(g) the estate was limited to the plaintiff, the vendor, for life, with divers remainders over, with a power of revocation and appointment of new uses to the vendor and his wife jointly: *Proviso*, that if he should become bankrupt, &c., the limitation to him for his life should cease, and the lands go to the trustees during his life for the benefit of his children. He proposed to make a title to purchaser under this power. Mr. Bradley, on behalf of the purchaser, objected that the vendor might have committed an act of bankruptcy, and if so, contended that his power of appointment was extinguished, and continuing of the same opinion notwithstanding *Dunning*, *Phipps*, and two other conveyancers thought the objection groundless, the defendant declined completing the purchase. The plaintiff therefore filed his bill for specific performance. The Master reported, that a good title could be made. No exceptions were taken to the report; but on the cause

(d) 2 Madd. 34 n.
(f) 3 Mer. 456.

(e) 1 Cox, 402.
(g) 1 Cox, 186.

coming on for further directions, it was insisted for the defendant, that it would be very hard under these circumstances to make him pay costs, as he had so good a reason for objecting to the title as a decided opinion of a gentleman in the profession. But the Lord Chancellor [*358] said he *thought there was no ground for the objection, and that he could not allow the mistaken advice of a third person to operate to the disadvantage of the party who was clearly in the right, and therefore gave the plaintiff his costs.

Where the Master reports, that a good title was not made till after the filing of the bill, merely on the ground of certain evidence not having been furnished by the vendor till that period; and it turns out to be the fact, that the evidence in question had been offered, but not actually furnished previous to the filing of the bill—in consequence of the purchaser not having expressed a wish for it—this is not a circumstance, which can have any influence on the question of costs, and the purchaser will accordingly be decreed to pay them.^(h) So in a subsequent case,⁽ⁱ⁾ where it was stated for the plaintiff, the vendor, that the grounds, on which the Master proceeded in his finding, were, that a recovery had not been suffered, and some certificates which were set forth in the abstracts had not been verified till after the filing of the bill, that the purchaser had never required that these certificates should be verified, and the solicitor of the vendor had by letter offered to suffer a recovery, which however was not suffered, because the vendee did not accept the offer, but insisted on other objections,—the Master of the Rolls said that if the facts were as represented by the plaintiff, he should make the decree with costs; *but the statement of the facts being controverted by the defendant, a reference was directed to the [*359] Master to state on what grounds he had proceeded in finding, that a good title was not shown till the time mentioned in his report.

In *Burnell v. Brown*,^(h) the purchaser, having unsuccessfully objected to the title, was ordered to pay costs. The purchaser had refused to complete, because it appeared that there was a right of sporting over the estate not mentioned in the particulars of sale. The Chief Baron (Richards) sitting with Master Cox having held that by his conduct he had waived this objection, with respect to costs, said, “the only question in the cause was, as to that objection, in which the defendant was wrong; he must, therefore, pay the costs.”

3rd, Where each party is left to pay his own costs:—In a case where it appeared, that in the course of the communications between the solicitors of the vendor and purchaser, the latter had required the production of several certificates, and other documents as evidence of the title; but the vendor's solicitor not considering them to be material, had declined producing them, and the purchaser upon this refusing to complete, the suit was commenced. Some of these documents were produced before the Master, and he stated it as his opinion, that they were necessary; but that, with respect to the others, he thought it was not necessary to call for them. On *the question who should pay [*360] the costs of the suit? Lord Eldon said, “the Master has reported that the abstract delivered by the vendors, was sufficient; but

(h) *Long v. Collier*, 4 Russ. 269.

(k) 1 Jac. & Walk. 175.

(i) *Holwood v. Bailey*, ib. 271.

though it may appear sufficient on the face of it, yet whether a good title can be made, must depend on whether there is evidence of the deeds and facts stated. For this purpose it seems the defendant, previous to the filing of the bill, called for some certificates and other evidence. The Master finds as to the certificates, that they were necessary, and as to the other matters on which some information was given by the vendors, and more called for, he finds that, that information was not necessary. Thus it appears that on the one hand the necessary information was not given, and on the other more was called for than they were entitled to; I think therefore both being in the wrong, that no costs ought to be given on either side.”^(l)

In *Ryle v. Swindells*,^(m) which was a suit by the purchaser of his reversionary interest from a person in the situation of an expectant heir, and where the terms were very favourable to the vendee, and the parties were not generally on an equal footing, although alleged intoxication and imposition at the time of transacting the agreement were disproved, yet the bill was dismissed without costs.

In *Burrows v. Lock*,⁽ⁿ⁾ where specific performance was decreed at the suit of the purchaser, it *being “an inadequate bargain as to the price,” costs were not given as against the vendor.

Although the rule is, that the vendor shall pay the costs up to the period when he shows a good title and the purchaser after, yet cases may easily be conceived where the strict adoption of this rule would be manifestly unjust. The vendor may go into the market with a title, which is in point of fact good, but which nevertheless is not so clear, but that a purchaser might very reasonably raise objections upon it; if these objections were ultimately decided against the purchaser, it would be hard to make him pay the costs of the suit, and yet, failing in his objections, it would clearly not be right to give him costs; by leaving each party to pay his own, the equities on both sides seem to be fairly adjusted; the vendor being wrong in bringing an obscure title into the market, the purchaser in taking objections, which however plausible are decided by the court not to be tenable. These observations are well il-

[*362] lustrated in a case of *Thorpe v. Freer*;^(o) there the purchaser *having objected to the title, and also suggested a doubt as to a matter of fact, in both of which having failed, specific performance was decreed against him; with respect to the question of costs the Vice Chancellor said, “if a purchaser make the suit necessary by a frivolous objection to the title, he must bear the costs which he has thus improperly occasioned; but if he state a serious objection, as to which it is reasonable that he should have the title fortified by the opinion of the court, the court will not compel him to pay costs, although the objection

(l) *Newall v. Smith*, 1 Jac. & Walk. 264.

(m) 1 M'Clel. 519.

(n) 10 Ves. 470.

(o) 4 Madd. 466; and see *Aislaby v. Rice*, 3 Madd. 260; *Cox v. Chamberlain*, 4 Ves. 631; and see *Vancouver v. Bliss*, (11 Ves. 463,) where Lord Eldon, speaking of *White v. Foljambe* (11 Ves. 337,) and saying that “*prima facie*, he should have thought the party who failed ought to pay the costs,” observes that the ground of not giving the costs was, “that the question was a pure question of title, which raised very considerable difficulties in the minds of those most capable of judging upon such a subject; there was nothing of previous representation, and the court was only to give an opinion upon a point of law, which it was very difficult for the parties to settle for themselves, without something of judicial opinion upon it.”

fails. The principle must be the same with respect to the purchaser's suggestions as to matters of fact. The court thought the doubt, as to the purchaser's having executed the powers of appointment before the bankruptcy, entitled to so much weight, that it directed an inquiry as to the fact: And although the Master has found that the power was not executed by the bankrupt, I cannot say that the suggestion of the defendant was frivolous. I think the purchaser in this case was not unreasonable in questioning both the law and the fact, though, as to both, the opinion of the court has been against him, and I cannot therefore order him to pay the whole costs of the suit. A party who fails can never receive the costs of the suit, and therefore each party must bear his own costs."

So in *Dakin v. Cope*,^(p) which arose on a bill *filed by [*363] vendors for specific performance of an agreement for the purchase of a leasehold public-house, the sale was made by the executors of Dakin; and on the margin of the abstract of title, delivered by them, was the following memorandum, in the hand-writing of the clerk to their solicitor:—"The lessors consent to waive all forfeiture or right of entry, which may have accrued to them by reason of the insolvency of Mr. Dakin, and will join in the assignment to the purchaser." The owner of the estate was made a party to the assignment of the lease, but refused to execute, alleging that she was not a necessary party; but she stated, that she did not wish to take any advantage of the forfeiture, if any had been incurred, and signed a receipt for the rent, for the purpose of waiving such supposed forfeiture. The purchaser, however, insisted that he was not bound to accept the assignment, unless the lessor joined in it. A bill was, therefore, filed, and a decree made against him, but without costs, on the ground that "the litigation had been in some measure occasioned by the marginal note in the abstract, and the acts of the plaintiff's solicitors."^(q)

Cases may, and frequently do arise, in which none of these courses with respect to costs would do justice between the parties; each party may have been partially wrong, but in different degrees, and then the court will endeavour to apportion the costs so as to meet, as nearly as possible, the exigency of such a case, which clearly demands that each party *should pay the costs incurred by his own error. Thus [*364] in a case, where the abstract originally delivered was imperfect, inasmuch as it did not show, that part of the premises had been originally copyhold, and did not satisfactorily identify the parcels; and objections being taken in the Master's office on these grounds, the vendor, to remove them, furnished additional abstracts of the title to the copyholds, and procured affidavits to supply the defects in the evidence of the identity. Sir Thomas Plumer, M. R., observed, "I cannot say that the defendant in this case has acted quite right; that he has not taken some objections that he ought not; but still I should feel great difficulty in fixing him with the costs. A vendor who seeks a specific performance should come prepared with his title; he ought to have it ready before he carries his estate to market. If he will sell it with a confused title he must be at the expense of clearing it. The plaintiff here comes into the office with an abstract undoubtedly imperfect, for it did not state what part of the land was copyhold; proceedings then follow at a great

expense, occasioned by the plaintiff's neglect. It gradually ripens into a better title; the time that elapsed during the inquiry improves it. The deeds did not, on the face of them, make out the title, as they failed to identify the premises. Affidavits are then filed which were not originally before the Master, and which were not before the defendant when he [*365] first resisted. Why was not this done before the commencement of the *suit, or why was it not provided for in the contract? We cannot now characterise the objections taken as frivolous, and though they have been removed it was not by any thing, that was in the defendant's knowledge at the time he put in his answer. Under these circumstances, can it be said, that the defendant ought to bear the costs, when a great part of them has arisen from the plaintiff's conduct in carrying to market a defective title? The defendant is not to pay the expense of clearing up the plaintiff's title; he ought not to pay, but he must receive so much as he expended before the difficulties were removed: in what he has done since the affidavits were brought in, he has been unsuccessful and he must pay the costs from that time."(r)

In *Jones v. Lewis*,(s) a suit for specific performance had been rendered necessary by the misconduct of a trustee, who, having in other respects behaved ill, was, in effect, ordered to pay the costs both of the vendor and purchaser.

In some cases where it is doubtful whether the plaintiff ought to have a decree, the bill will be dismissed without costs, on his waiving an action at law against the defendant, otherwise not,—the object of this qualified order being to put an end to the litigation.(t)

[*266] *Whether a bill can be dismissed, and the defendant ordered to pay the whole, or any part of the plaintiff's costs, does not seem to be positively decided.(u)

When a contract is set aside on the ground of inadequacy of price, it is generally upon terms of re-paying the sums actually laid out and expended and interest, together with the costs of the suit. With respect to the costs, "it seems hard," as Lord Thurlow has observed,(v) "that where a contract is set aside upon an equitable ground, that still the contract should remain a security for all the costs generally, and which have been incurred by the defendant putting the plaintiff to the necessity of filing a bill, and by his defending a contract which ought not to stand." The rule, however, is so settled, and as it does not appear to be capable of explanation, probably originated, like many other arbitrary rules, in [*367] an accident.(w) The same rule as to costs prevails, *with a modification, where the sale of an interest in possession is

(r) *Wilson v. Allen*, 1 Jac. & Walk. 623. (s) 1 Cox, 199.

(t) Per Lord Redesdale in *Harnett v. Yielding*, 2 Sch. & Lef. 560; and see *Buxton v. Lister*, 3 Atk. 384, where Lord Hardwicke acted on this rule; see also, *Spurrier v. Hancock*, (4 Ves. 667,) where the bill was dismissed without costs, on the defendant undertaking to give up the agreement.

(u) *Lewis v. Loxam*, 3 Mer. 529, and cases cited in 430 n.

(v) *Gwynne v. Heaton*, 1 Bro. C. C. 11.

(w) It grew most probably out of Lord Cowper's decision in *Twisleton v. Griffith*, (1 P. W. 310:) that case was decided chiefly on the authority of *Berney v. Pitt* (2 Ver. 14;) a cause first heard by Lord Nottingham who denied relief; but was afterwards reheard by Lord Jeffreys, who granted relief, declaring "that these bargains were corrupt and fraudulent, and

set aside on the ground of inadequacy, coupled with such circumstances of distress on the part of the vendor, as leads the court to think that advantage has been taken of his situation. Thus in *Wood v. Abrey*,^(x) Sir T. Plumer, said, that "though he could not after the cases which had been decided, make the defendant pay costs; yet he could not bring his mind to give to a defendant the costs of a suit made necessary by his unfair dealing." And the rule seems now to be settled accordingly.^(y)

It may be observed in the last place, that the answer though not evidence in the cause, may be *read as to the question of costs; but depositions, it seems, cannot be read as to costs, unless [*368] they have been read as evidence in the cause.^(z)

*CHAPTER III.

[*369]

OF THE CIRCUMSTANCES ON WHICH THE MARKETABLENESS OF TITLES DEPENDS.

THE distinction taken between a title which is *clearly bad*, and one where it is only *doubtful*, whether it be good or bad, has been already explained.^(a) It has been seen that in order to induce a court of equity to dismiss a bill for specific performance, it is not necessary for the purchaser to show that the title is bad, it is enough for him to throw a cloud upon it, and satisfy the court, that it is at least a question, whether it be good. A court of equity will not compel a purchaser to accept a title, unless the vendor can show that it is free from all doubt either as to matter of fact, or matter of law. To entitle the latter to the aid of the court, he must be able to show a clear commencement of his title sixty years ago at least,—a clear intermediate deduction of the legal and equitable estates, vesting them ultimately in himself or in persons [*370] who *are trustees for him,—and, that they are now free or capable of being discharged, from all incumbrances.

tended to the destruction of heirs sent up to town for their education and to the utter ruin of families; and that the relief of the court ought to be extended to meet with such corrupt bargains and unconscionable practices." With respect to Lord Jeffreys' decree, Lord Cowper thought, "that the reason inducing it was probably to discourage a growing practice of devouring an heir on a confidence in Lord Nottingham's decree, but Lord Jeffreys' decree standing showed that every one thought the same was just; and that there was therefore no attempt in Parliament to reverse it." With this presumed object, of which his Lordship very properly approved; he thought that the authority of Lord Jeffreys was, in this instance, better deserving of being followed than that of Lord Nottingham. He relieved the plaintiff on payment of "principal, interest, and full costs," adding, as if conscious that he had not done complete justice, "I mean *liberal costs*." It is manifest that Lord Cowper did not see his way very clearly to this decision; or at all events that he rather thought he ought not to have so decided, and that he threw in these "*liberal costs*," as a sort of counterpoise on the other side of the scale.

(x) 3 Madd. 424.

(y) *Hincksman v. Smith*, 3 Russ. 436.

(z) *Howell v. George*, 1 Madd. 13; *Dawson v. Ellis*, 1 Jac. & Walk. 524, where the answer of a peer, which is put in not upon oath, but on his protestation of honour was read as to the question of costs. And see *Vancouver v. Bliss*, 11 Ves. 464, where Lord Eldon observes, that "he was bound on the question of costs to look at the answer."

(a) Chap. I.

Whether a title be, or be not marketable; is a question which in one sense may be easily resolved; for if it be open to judicial doubt, it is not marketable. What may be a sufficient foundation for judicial doubt must in some degree depend on the discretion of the judge,^(b) and cannot be conclusively reduced to fixed and determinate principles. "In attempting," says Sir Thomas Plumer in *Price v. Strange*,^(c) "to lay down a rule upon the subject, I should say, a purchaser is not to take a [*371] property, which he can *only acquire in possession by litigation and judicial decision."

A party offering an estate for sale undertakes, in the absence of express stipulation, to make over to the purchaser the complete and absolute dominion of it. In the case of personal chattels,—things capable of being passed from one person to another by the simple act of delivery,—the transmission of property is effected by the mere handing over the thing sold in return for the purchase-money, and the possession and the ownership generally go together. This is not so with land, the bare possession, or even the right of possession for a certain period, being quite distinct from the right of property. This distinction is plainly not a mere technical or conventional refinement, but springs out of and is inseparably connected with the very nature of landed property; for, in the first place, land does not admit of that sort of actual and manual delivery and possession, which personal chattels do; and in the next place, in consequence of its permanent and unchangeable existence, it admits of a variety of modifications and subordinate portions of interest, manifestly incompatible with the changeableness and constant wear and decay of personal chattels, which modifications of interest may belong to a variety of persons having no direct connection with the land, and whose rights can only be defined by means of written documents. Thus there may be the owner of the estate, his tenant, one or more mortgagees, bond and judgment creditors, &c., each of these persons having separate and inde- [*372] pendent interests *which are clearly ascertained and defined by the law. None of the parties having these separate interests can alone convey the entire interest in the estate: the party who has the actual possession, or the right to it, must pass that, either by actual delivery or by some act tantamount to it; the other parties having a right, rather to a share of the profits of the land than to the land itself, must convey their respective interests by deed, in the same way in which they were created.

Hence, in *Hiern v. Mill*,^(d) we find Lord Eldon very emphatically

(b) "But that is not an arbitrary, capricious, discretion; it must be regulated upon grounds that will make it judicial," (Per Lord Eldon in *White v. Damon*, 7 Ves. 35.) So in *Cowper v. Earl Cowper*, (2 P. W. 753,) Sir Joseph Jekyll, after observing, that courts of equity ought to follow the law in their judgments concerning titles to equitable estates, otherwise great uncertainty and confusion would follow; and that though proceedings in equity are said to be *secundum discretionem*, adds, "yet, as it is said in *Rooke's case*, (5 Rep. 99 b.) that discretion is a science not to act arbitrarily according to men's wills and private affections, so the discretion, which is executed here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn be subservient to the other. This discretion in some cases follows the law implicitly; in others assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigour of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with."

(c) 6 Madd. 159.

(d) 13 Ves. 122.

laying it down, "that land is not held by possessions but by title; not so as to personal chattels, for the common traffic of the world could not go on. Therefore, a sale in market overt changes the property of a chattel; and that rule, that possession is the criterion of title to a chattel, has been adopted in the bankrupt acts; so that if the owner has permitted the bankrupt to be the visible proprietor, the property is divested; for no one can distinguish the property except by the possession. But that is not so as to land; for no person in his senses would take an offer of a purchase from a man, merely because he stood upon the ground. It is not even *prima facie* evidence. He may be tenant by sufferance, or a trespasser. A purchaser must look to his title, and if [the vendor] being asked for his deeds, he acknowledges he has not got them, the purchaser is bound to further inquiry."

*The title to the land is not, therefore, necessarily connected with the possession of it, and may be quite distinct [*373] from and independent of the apparent ownership. The complete dominion over real estate implies an union in one person of all the several modifications of interest which have been carved out of it,—and a vendor therefore is said to have a good title, when he has within himself, or in other persons whom he can control, all these several portions of interest. The series of documents, showing his right to the possession, and tracing the creation and devolution of the several independent portions of interest which exist in the estate, until they come into the hands of the vendor, or of trustees for him, constitute, therefore, what is commonly called the title to his estate.

This mode of speaking is not quite correct, and appears to have led to some difficulties which would have been avoided by a more careful consideration of the subject. The deeds, by which a man shows his title, do not constitute the *title*, but merely the *evidence* of it. A title, therefore, may be perfectly good if there be no deeds at all, provided their place can be supplied by evidence as satisfactory; though at one time it was thought, that, where the title rested merely in possession and there were no deeds, it was not marketable. In a case mentioned by Mr. Preston,^(e) where the title depended merely on descent from ancestor to heir, and heir to heir, through successive generations, without any will, *settlement, or other conveyance occurring; an objection was taken to the title, that there were mere descents and [*374] no deeds. The question was referred to two eminent conveyancers, who were of opinion, that the title was not marketable, and advised an abatement of one-third of the purchase-money, on account of the risk to which the title was exposed, and the difficulty that would attend it when carried into the market; and the abatement was made accordingly. In a subsequent case, however, a party having refused to complete on this ground, a suit was instituted; and the court over-ruled the objection, and decreed specific performance.^(f) Such a title, however, is always to be viewed with great jealousy, the usual searches for incumbrances should be made with the greatest care; the courts of record should also be searched for fines and recoveries, and the ecclesiastical courts having

(e) 1 Abstr. p. 23, and see *ibid.* p. 255, which appears to refer to the same transaction.

(f) 1 Abstr. p. 23.

jurisdiction over the effects of the successive owners for wills and letters of administration.

If the absence of all documentary evidence would not necessarily be an objection, *à fortiori* the absence of a single deed or will, though bearing date within sixty days, cannot be, provided the absence of that document and the matter of its contents can be satisfactorily explained; or if, under all the circumstances of the case, the clear presumption be that this instrument, if produced, would not throw any difficulty upon the title.^(g)

Owing to the great length and number of the documents constituting the evidence of a title, and the *loss of them, which might result from their being handed over to third persons, an abstract^(h) of their *contents, which constitutes the basis for investigating the title, is usually submitted to the inspection

(g) *Minchin v. Nance*, MS. App. B.

(h) The causes which have mainly contributed to the great length of abstracts, and the heavy expense of investigating title, are so fully and lucidly explained in the following extract from Mr. Tyrrell's communication to the Commissioners appointed to inquire into the Law of Real Property, that no apology can be necessary for introducing it here.

"The expense of proving and investigating titles is augmenting every day, with the increasing length of abstracts. If a title be shown for sixty years, it will usually be found, that the part of it, which relates to the last twenty years, exceeds in length the part, which contains the title for the preceding years. There are several causes which have tended to occasion the increase.

1st. The alterations in the wealth and population of the country, have given greater facilities in selling and raising money upon land, and rendered the transfer of property more frequent.

2nd. The same causes, together with various commercial negotiations, have given rise to more complicated contracts and transactions, which require long and intricate deeds.

3rd. The instances are fewer in which parties marry without a settlement, or neglect to leave a will.

4th. Much greater length in deeds and wills is occasioned by the numerous additional provisions, which experience has shown to be necessary or convenient. Formerly when an estate was sold, it was conveyed by a short deed to the purchaser in fee with a clause of warranty. Now recitals (which are rendered necessary by the complicated state of the title,) provisions for barring wife of dower, and covenants for the title and further assurance, are inserted. When an estate was mortgaged it was merely conveyed or demised, on condition to reconvey, to be void upon payment of the money. Now powers of sale and covenants for the title, as well as covenants to insure against fire, are usually required. When an estate was settled by deed or will it was simply limited to the parties intended to be provided for during life, and entailed upon their issue, and perhaps a power of leasing was inserted; now settlements usually contain limitations of estates to preserve contingent remainders, powers of appointment among issue, provisions for pin-money, and jointures,—for the maintenance of infants during minorities, and for raising portions for younger children; powers of jointuring future wives, and providing for the issue of a future marriage; and besides the mere power of leasing at rack-rent, other powers are given to grant building and improving leases, work and let mines, cut timber, make partitions, enfranchise, sell, and exchange lands, and invest and vary the securities of money produced by sale, and to appoint new trustees.

5th. The deeds for exercising the powers of charging and of appointing new trustees, &c. have added considerably to the length of abstracts.

6th. In consequence of the division of estates, deeds of covenant for the production of the title deeds by the party, who holds them, to the owners of the other parts of the estate, have in many cases become necessary.

7th. The frequent insecurity of titles, in consequence of the suppression of deeds and incumbrances, has rendered it necessary to keep on foot terms of years and charges, and to have them assigned by distinct deeds to trustees, in order that if any claim be made in respect of any secret conveyance, mortgage, settlement, or charge, the prior term or estate, vested in the trustee, may be set up as a protection against it. Such assignments are a material addition to the expense of the parties for whose benefit they are made, as well as to the length of abstracts.

of *the purchaser. This abstract is complete, when it appears that upon certain acts done, the legal and *equitable [*377] estates will be in the purchaser; that may be, long before the title is completed.⁽ⁱ⁾ The acts in question must, how- [*378] ever, be such as the vendor can cause to be done: the title must be outstanding in persons, who are trustees for him, or who, being mere incumbrancers, can be brought in, on paying off their claims.

Hence, in a recent case,^(k) where the title was derived under the family of the late Earl of Bridgewater, one of whose ancestors conceiving himself to be tenant in fee, had conveyed to the parties through whom the plaintiff claimed, it turned out, upon investigation, that the premises were at the time of that conveyance subject to an entail in Lord Bridgewater's family, and that the entail was still subsisting, and had become vested in Lord Bridgewater. Application was made to that nobleman to suffer a recovery, in order to enable the plaintiff to complete his title. For that purpose a deed, making a tenant to the *præcipe*, was prepared; and, on the 25th of June, the plaintiff delivered to the defendant an additional abstract, stating the deed of release, but leaving the date of it a blank, and otherwise representing it as a deed which had not then been executed. On the 2d of July, the deed was executed, and a warrant of attorney to suffer the recovery was signed by Lord and Lady Bridgewater. *The recovery was duly suffered [*379] as of Trinity Term, 1821, and the teste of the writ of seisin bore date the 11th of July, 1821. It was not shown to the defendant

Most of the additional provisions and deeds have been adopted for the convenience of the parties, but several (and as examples, may be mentioned the clause for authorizing trustees to give an effectual discharge, and in many instances assignments of terms and charges) have been rendered necessary by the mischievous decisions of courts of equity.

8th. The numerous cases of sales of the estates of bankrupts and insolvents, render the proceedings under the bankruptcies and insolvencies necessary parts of the title.

9th. The more frequent cases of exchange and enfranchisement, which render necessary the statement and proof of the additional titles of the land given in exchange, or of the freehold of the manor.

10th. Inclosure acts, more than any other cause, occasion abstracts of extraordinary length. If an allotment be made in respect of two different lands, held under distinct titles, a part of the allotment is subject to each of the titles; and there being no means (except an act of parliament) by which the allotment can be apportioned, both titles must be proved, in order to show a good title to any part of the land. It frequently happens that one allotment is made in respect of estates held under a great number of different titles; and I have known an abstract of the title of a single field (part of an allotment) contain the titles of more than twenty estates. If the title to one of the estates, in respect of which the allotment has been made be defective, a good title cannot be made to any part of it.

11th. Many estates have been sold and purchased, or conveyed, under the provisions of the public acts for the redemption of the land tax, sale of Crown land, sales under extents, sales of the estates of lunatics, the exchange of glebe lands, and the general inclosure and highway acts, and the variety of new forms and modes of conveyance (dissimilar to any previously, recognized by the law,) which have been authorized to be made by these acts, and the proceedings of courts of equity required by them, have added considerably to the complication of titles. And,

12th. The numerous private acts which are passed in every session, for making canals, harbours, railways, bridges, and roads, for forming gas and other companies, and for improving towns, and regulating parishes and districts with respect to the poor, sewers, pavements, &c., all contain provisions for the purchase of land, and the re-sale of so much of it as shall not be wanted. And when any land has been re-sold, the powers of such acts, (which are very various,) and the different peculiar conveyances authorized by them, must be stated in the abstract." (1st Rep. of the Real Prop. Com. App. p. 515.)

(i) Per Lord Eldon in *Braybrooke v. Inskip*, 8 Ves. 436.

(k) *Lewin v. Guest*, 1 Russ. 326.

before the 14th July, that the recovery was completed. A bill for specific performance had been filed by the vendor on the 6th July; and the question was, Whether the plaintiff had shown a good title before the bill was filed? and Lord Gifford, M. R., held clearly that the plaintiff did not show a good title until the recovery was suffered,—on the ground that there was an independent title in Lord Bridgewater, who was under no obligation to suffer a recovery for the plaintiff, and though he might think himself bound in honour to do so, that could not cure the defect; but that the case would have been different if the estate had been in a person, who, being a trustee for the plaintiff, was under an obligation, capable of being enforced in a court of justice to execute such a deed, or do such acts as his *cestui que trust* might require.”

The right to a good title, is a right not growing out of the agreement between the parties, but given by the law,—the purchaser being entitled to have a clear title shown, not merely on the ground that it is stipulated for by the agreement; but on the footing of the principle growing out of the nature of the contract, that as the purchaser parts with good money, the vendor shall give in return an estate with a clear title.^(l)

[*380] The recent case of *Clarke v. Faux*,^(m) furnishes an illustration of the principle of these remarks. In this case, part of the purchase-money had been paid, and by a new agreement entered into, subsequently, but before the time originally appointed for the completion of the contract, it was stipulated, that the purchaser should pay the residue of the money on a day named, “upon the vendor’s making a good title to the premises; or otherwise, if such title could not be then completed, upon the vendor executing at his own expense, a bond to complete such title, and to convey the estate as soon as the same could be completed.” It was afterwards discovered, that the vendor could not make a good title, and the purchaser refused to pay the residue of the purchase-money, upon which the vendor brought his action at law on the last mentioned agreement, and the purchaser filed his bill for a specific performance, if a good title could be shown, otherwise for the contract to be delivered up, and that in the mean time the proceedings at law might be restrained. The only question was as to the effect of the agreement; and, whether the true construction of it was, that the purchaser should take the title, good or bad? It was insisted on the behalf of the vendor, that if the vendor should be unable to make a good title, then the purchaser must rely on the bond; and on the behalf of the purchaser, that the true construction of the agreement was, that

[*381] he was *not to be compellable to complete the contract, unless the vendor could show that he would be able within a reasonable time to make a good title. The latter appears to be the just construction of the agreement, which on the face of it, does not show the slightest intention on the part of the purchaser to waive his legal right to have a good title. It frequently happens, in cases where it is quite clear that the vendor can make a good title, that considerable time must elapse before it can be perfected; there may be, for instance, outstanding terms, evidence of the deaths or heirships of parties to be procured, intestacies to be proved, administrations granted by a wrong court which have to be rectified, and a variety of other circumstances, likely to produce delay, though it may be perfectly apparent that ulti-

(l) *Ogilvie v. Foljambe*, 3 Mer. 53.

(m) 3 Russ. 320.

mately a good title will be made. Having regard to these considerations, the agreement in question would, in the absence of special circumstances, point rather at the delay which might arise from circumstances of this kind; and therefore the reasonable inference is, that its object was to enable the purchaser to spur the vendor on to the completion of such acts, or inquiries, as might be necessary to perfect his title. And accordingly this view of the question was taken by the court. "I conceive," said Lord Lyndhurst, "the meaning of the parties, as collected from the terms of the contract, to have been, that the money was to be paid on the day named, although the title might not then be completed; but subject always to this condition, that the vendor had the power to *complete it, and that it was not intended that it [*382] should be paid, if the vendor did not possess such power. The stipulation as to the bond, was merely intended to guard, upon the money being paid, against supineness and delay in doing that, which it was assumed the vendor had the means of doing, and which by the agreement, I conceive, he engaged to do, namely to make a good title to the estate."

The question is not unlike those of the vendor's lien for unpaid purchase-money, which have been already considered. The same, or very similar reasoning, would apply to the two cases. The law, independent of contract, gives the vendor a lien on the estate sold, for his purchase-money,—the law, independent also of contract, gives the purchaser a right to a clear title. And, consequently, the benefit of the latter, like that of the former, can only be waived by the purchaser's agreement, in words express, or manifestation plain, so to do.

A late case of *Peart v. Bushell*,⁽ⁿ⁾ may be considered here: At the time of sale, the vendor's solicitor gave an undertaking to cause satisfaction to be entered up on any judgments that might be found against a party, through whom the vendor derived his title,—to procure evidence of the death of certain other persons,—and a covenant for the production of certain deeds, unless the originals were delivered up. After payment of the purchase-money, this undertaking not having been performed, a petition by the *purchaser, that the court would [*383] interfere by its summary jurisdiction over the solicitor, to compel performance of the undertaking, was refused on the ground that some of the items of the undertaking were such, that their performance might be impossible,—and that this was not such a matter as came within the jurisdiction, not being strictly an undertaking in a cause, and therefore not a proper case for a court to act on by its extraordinary authority; and it was laid down, that the only remedy for the petitioner would be, to bring his action for damages if his possession should be disturbed on account of any thing arising upon the matters in the undertaking.

Where a party brings an estate into the market generally, without any stipulation as to the title, the mere circumstance of his selling in a fiduciary capacity,—as the assignee, for instance, of a bankrupt,—will not affect the purchaser's right to have a clear title; a trustee, in the absence of agreement to the contrary, being as much bound as other persons, to

(n) 2 Sim. 38.

show a good title. Thus in a modern case,^(o) where the assignees of a bankrupt filed a "bill against the purchasers, the Master [*384] having reported against the title, it was, on further directions, insisted for the vendors, that the defendant ought either to accept the title as it was, or give up the contract; Sir W. Grant said, "as to the question whether the defendant must either take the title as it is, or give up the contract, the bill is filed to obtain a specific performance, and must be dismissed."

In the course of judicial discussion and consideration, many questions of title are getting cleared up from time to time. Thus, where a vendor made out his title, through a modern will, which disinherited the heir-at-law, it was formerly the practice to require the will to be proved against him; but this has been for a considerable period discontinued, and it is now clearly settled, that the fact, of the will not having been proved against the heir-at-law, is no objection to the title.^(p) It is nevertheless very desirable in such a case to have the concurrence of the heir-at-law, if that be practicable; and whenever he is a party to the deed for any other purpose, it is the universal practice to make him a party also in his character of heir-at-law. So according to the *dicta* to be found in very modern decisions, doubts appear to have been entertained, whether a title depending on the destruction of contingent remainders ^[*385] was marketable. Thus from the observations which fell from Lord Eldon, in *Roake v. Kidd*,^(q) it is to be inferred, that at this period, his Lordship's opinion was, that a court of equity would not sanction, or establish such a title. It has, however, at length been settled, that such a title is good, and that a purchaser must accept it.^(r) So at one time, considerable doubt was entertained, whether a title, depending on a fine and non-claim, could be enforced, but on being brought to the test of judicial decision, it was determined that it could; the court having in a recent case compelled a purchaser to accept a title, bottomed on the operation of the statute of non-claim on fines, on evidence showing, who was the heir to be barred and that he was free from disabilities.^(s)

Where an estate is sold under a decree of the court for the administration of assets, payment of debts, &c., all proper parties, including the trustees, being before the court, it has long been established, that a purchaser would not be allowed to object to the title, on the ground that the legal estate was outstanding in an infant, or in trustees, who were infants, the court relying on its power to give a complete title as soon as the party should be competent to make the conveyance. It was said, that the sanction of the title by the court gave the purchaser a sufficient

(o) *McDonald v. Hanson*, 12 Ves. 277, over-ruling *Pope v. Simpson* (5 Ves. 145,) where Lord Loughborough dismissed the purchaser's bill against assignees of a bankrupt with costs, alleging as the ground of his judgment "that where persons purchase from the assignees of a bankrupt, they have no right to expect more than that the assignees should deliver over such title as the bankrupt had, and it was a fair proposal on the part of the assignees to say 'take it or be off.'" See also *Freme v. Wright*, 4 Madd. 364; *Clarke v. Faux*, 3 Russ. 320.

(p) *Bellamy v. Liversidge*, Chan. 12th June, 1786, stated in Sir Edw. Sugden's *Vend. & Purch.* 342, 8th ed. from MS.; and see also *Wakeman v. The Duchess of Rutland*, 3 Ves. 232; 8 Bro. P. C. 145; *Morrison v. Arnold*, 19 Ves. 673.

(q) 5 Ves. 647.

(r) *Hasker v. Sutton*, 2 Sim. & Stu. 313.

(s) 2 Prest. Abstr. 379.

guarantee for its goodness; *but, at best, it must be considered an anomalous practice, that a court of equity should [*386] have a power of sale without also having the means of making a good title. This practice, very questionable in principle, if not occasionally working some degree of injustice, has been at length superseded, by the interposition of the legislature, which has provided, by a series of enactments commonly known by the description of Sir Edward Sugden's acts, for the several cases in which courts of equity were in the habit of enforcing contracts for sale under a decree, notwithstanding they were unable to give the purchaser the legal estate.

The title to all renewable leaseholds is unmarketable, because a chain of reference is kept up by the mention of every surrendered lease, as part of the consideration for the renewal; while the vendor has no means of producing the said leases, because they are delivered up to the lessor, who may have destroyed, or may object to show them. (t)

So anxious is a court of equity to protect the rights of a purchaser, that a vendor will be compelled, not only to exhibit an unquestionable title; but also to make a conveyance to the purchaser in such a manner as shall be not only perfectly legal and complete, but also in addition to its being complete, shall be in such a form as to free the [*387] purchaser *from any difficulty of proof, in respect to the validity of it. Thus in the sale of copyholds, a surrender by attorney may be perfectly valid, yet as, in the interval between granting the power of attorney and the actual surrender, the power may by the death of the vendor, or otherwise, be revoked; the court, in order to avoid any difficulty to the purchaser's title, which might grow out of this circumstance, will, it seems, compel the vendor to surrender in person. It was so decided in *Noel v. Watson*, (u) when Sir J. Leach held, "that although at law a surrender by power of attorney cannot be questioned, yet as it in truth imposes a greater difficulty of proof of title upon the purchaser, and may expose him to a question, whether the power of attorney had not been revoked, this court, when the vendor comes for its aid in the sale, will compel the vendor, if it can be conveniently done, to make the surrender in person." In this case, indeed, it ought to be observed, that the sale was under the decree of the court; but this circumstance does not appear to make any difference in the reasoning, which the court adopted.

In the older case of *Mitchell v. Neale*, (v) the same point was a good deal discussed in another form; and it appears pretty plainly from what Lord Hardwicke said, that he would not have assisted a vendor in a suit by him for specific performance, unless he would have surrendered in person. There *the only question was, Whether the defend- [*388] ant should surrender by attorney or in person? The purchaser insisted that the vendor ought to surrender in person, the vendor that it was competent for him to do so by attorney. The plaintiff went into evidence to show that by the custom of the manor, whoever wanted to surrender, must do so in person, unless in certain cases of disability. At the hearing the Master of the Rolls directed an issue as to the custom.

(t) As to the title to *leaseholds* and *tenant-right* estates, see some useful observations, 1 *Pres. Abstr.* p. p. 11-16: As to the title to lands sold by lay corporations, *ibid.* 272-274.

(u) 6 *Madd.* 50.

(v) 2 *Ves. Sen.* 679.

From this decree, the defendant appealed. Lord Hardwicke affirmed the decree, saying—"I am of opinion that there is no ground in favour of the defendant to vary this decree. I am in the case of a purchaser of an estate whom no court of justice will compel to accept of such purchase upon any doubtful title. It is not a question now what kind of title a man may have in his family, but what kind of title a purchaser is compelled to take; upon this question, whether a good title can be made, the court, in favour of the defendant, has directed an issue that if this may be a good title to a plaintiff by letter of attorney, he may accept of it, to which two objections are taken. * * * But I go further still, and think this rather a direction in favour of the defendant, and that the plaintiff had much more reason to complain of it; for the vendor can without the least inconvenience do that act himself:—and 'then there is no instance of the court compelling a person to take it by attorney. A purchaser may be put under difficulties by this means, for the letter of attorney may be lost, and the *party is obliged to prove it [*389] and the execution of it; although I allow that courts of law would make strong presumptions in such case; but why should a purchaser be put to that? A letter of attorney may be revoked the next moment; that revocation may be notified to the attorney without the purchaser's knowing it, and then the conveyance would be void, and the purchaser's only remedy would be by suit in equity. Suppose the conveyance was to be made before a Master, under the direction of this court, and the vendor said he would do it, but would do it by attorney, though living next door to the Master and in his power to do it himself, this court would not allow that, and if the vendor said so to me, I would commit him for not doing it himself; for I would not compel a man to accept of a title under a letter of attorney, of which there is no instance, unless a necessity appears for it. This, therefore, is very unreasonably complained of on the part of the defendant; consequently the decree must stand, and the plaintiff have the deposit."

When notice of any trust is discovered, the purchaser, unless he is exempted by a special clause in the instrument, by which it was created, is bound to see that it is duly performed, and therefore the instrument that created the trust must be produced and form part of the title, and the purchaser must have a deed of covenant to enable him to require the production of it on any future occasion.

Having premised these observations, which might easily have been extended on the purchaser's right to a clear title, it is proposed now, [*390] First, to take *a survey of the cases involving the question, whether the title was, or was not marketable; to consider, Secondly, How far it is competent for the vendor, by the contract, to modify the purchaser's right to title: and Lastly, by what acts, on the part of the purchaser a court of equity will hold that he has waived his objections, and agreed to accept the title as it stands.

SECTION I.

A short Outline of the Authorities on Questions of Doubtful Title.

A title may be doubtful, or, in other words, unmarketable, in respect of the uncertainty of some matter of fact occurring in the course of its de-

duction;(1) or, because any given link of it depends upon a conclusion of law, which is not quite clear upon the authorities;(2) or, because in any of the intervening transmissions from the ancestor to the vendor, the forms of the authority or power, under which the transmission was made, have not been strictly complied with;(3) or, because it is not shown, that incumbrances or charges, notice of which appears on the abstract, have been, or can now by the vendor, be discharged;(4) or because the vendor is not in a situation to give the purchaser a good discharge for his money;(5) or, lastly, because he is not able to deliver over to him such of the muniments of title as, according to the authorities and the ordinary course of practice, he is entitled to.(6)

*Having traced a sketch of the several heads here adverted to, a few observations will be added as to the nature of [*391] the public records, and other documents and sources to which resort may be had, for information on questions of ancient boundary, tenure, pedigrees, &c. &c. (7)

(1) Of Defects of Title, arising from uncertainty as to some Matter of Fact.

A very great proportion of the objections to title arise from the imperfect state of the evidence. In order to support the title, it may be necessary to show the marriage, or death of parties at a certain period; or the death of persons entitled for life; or the failure of issue of tenants in tail; or the legitimacy of a party; or the pedigree of a person claiming as heir-at-law; where a title depends on a limitation to the *first* son of A in tail, it may be uncertain whether the party claiming in that character truly answers the description;(w) there may be notice of *old [*392] deeds, and those deeds not producible, and, consequently, it may be uncertain whether they do, or do not disclose incumbrances; the identification of the parcels may be imperfect; there may be an intermixture of freehold and copyholds, and it may be impossible to discriminate the lands of these respective tenures;(x) where the lands are held

(w) The danger is that the person claiming to have been *first* son may have been born before the marriage of his parents, and that fact concealed; "the certificate of baptism and an affidavit of legitimacy are the proper precautions against a surprise in this particular," (1 Abst. 48.) The limitation may be confined to the first son and not extend to the *second*, and the first son may die early; in such a case the probability is that his death may be concealed to enable the second son to assert a title to the estate,—"in such a case no registry of baptism will be found" "This happened," says Mr. Preston, "in a county near the metropolis, and the fact was never discovered until the second born son was about fifty years of age, and then like most other cases of fraud, it led to his ruin, or at least hastened it." (Ibid.)

(x) "Another great inconvenience arises from the difficulty of identifying the copyhold land; freehold and copyhold lands are frequently intermixed. They are rarely distinguished by the description of them in deeds and court rolls; the description in the latter being seldom changed, and often bearing in names, and even in quantity, no resemblance to any modern description of the parcels. When long held by the same owner, the boundaries between such of them as form part of the same enclosure are obliterated and forgotten, and it becomes necessary to make a freehold conveyance, and also a copyhold conveyance of the same land. If the owner, mistaking the tenure, open a mine, or cut timber upon the part of his land, which he erroneously believes to be freehold, the land is forfeited to the Lord, who may seize it upon proving it to be copyhold. Upon a sale an insuperable objection may be taken by the purchaser, that the vendor cannot point out with certainty, what part of the estate is freehold and what is copyhold. This inconvenience from confusion of boundary is particularly felt in the counties of Norfolk, Suffolk, and Essex." (Third Report of the Commissioners of the Law of Real Property, App. p. 15.)

in ancient demesne,(y) it may be impossible to ascertain whether fines
 [*393] and recoveries alleged to have been levied and *suffered, or
 which may be necessary to levy and suffer, be not void in
 consequence of a fine or recovery having at some former period been
 levied or suffered in a superior court; with respect to lands in Kent,
 it may be impossible to determine whether they are of gavelkind;(z) whe-
 ther lands sold tithe free are actually so; as to lands sold under the decree
 of a court of equity, whether it has been duly complied with; when the
 lands have been sold under an Act of Parliament, whether the formal-
 [*394] ties prescribed by it have been strictly complied with. Lands
 may *have been given by deed or will, subject to a forfeiture
 [*395] on the non-performance of certain conditions, *and the ven-
 dor may be unable to show that the condition has been ful-
 filled.

(y) "The tenants in Ancient Demesne, properly so called, were made subject to certain restraints, and entitled to certain immunities, which produce serious inconveniences at the present day. They were forbidden to bring or to defend any real action touching their tenements, except in the Lord's court; and they were exempted from serving on juries elsewhere, and from paying toll in any part of England. From the obligation to sue and the privilege to be sued in the Lord's court, arose the serious mischief pointed out in our first report that all fines and recoveries of land held in ancient demesne levied or suffered in a superior court though not void, are voidable at any distance of time by a writ of *disceit*, at the suit of the Lord, and that when a fine or recovery of land held in ancient demesne, has been once levied or suffered in a superior court, by which until reversed the land is turned into frank free, a fine or recovery of it levied or suffered in the Lord's court, is absolutely void. When it is considered, that nothing necessarily appears on the face of the abstract, or in the title deeds, to denote that the land is of the tenure of ancient demesne, it will be understood that mistakes of this kind in levying fines and suffering recoveries, frequently involve titles in great embarrassment." (Third Report of the Commissioners on the Law of Real Property, p. 13.)

(z) "There appears to be a growing danger of questions arising, as to what lands in Kent are exempt from the custom of gavelkind. A gentleman of great eminence at the bar,* who has become a purchaser of large estates in Kent, being asked whether there be any prevailing uncertainty on the subject, says—"I think it very probable that questions may arise upon the subject. You find it generally laid down, that all lands in Kent are gavelkind, and that therefore no great inconvenience arises. It must be very clearly proved that they are not gavelkind, and it is said such proof cannot be given. I bought an estate the other day, where it was perfectly clear, that it was not gavelkind. I have purchased three estates in Kent, where I am perfectly satisfied none of them are of gavelkind tenure, and now the records are thrown open by the parliamentary commissioners, I have no doubt many more such will be found." He afterwards goes on to state, that he has no doubt, that some lands in Kent were held *in capite*, and never were gavelkind; and that there are many monastery lands in the county, which were held in Frankalmoin, and which may not be gavelkind.

"A recent case was proved to us, in which a regular gavelkind title was shown to lands in Kent; but the name of a person, mentioned in one of the disgavelling acts, appearing in the abstract, inquiries were made to ascertain whether the lands might not have been disgavelled; and by means of a county history and an *inquisitio post mortem*, it was ascertained that they had descended on the death of the person named to his common law heir. They had afterwards been treated as gavelkind, and the legal estate being outstanding, the gavelkind heirs, who were infants, were declared to be infant trustees, within the statute of Anne, and conveyed accordingly,—each conveying only his share. The discovery induced counsel to treat the land as disgavelled, and to require a conveyance of the entirety from the common law heir. This occasioned a new application to the Court of Chancery, the heir having died leaving an infant son, who conveyed under the order of the court.

"No lapse of time or adverse possession can alter the tenure; and where, from the inspection of ancient records, which have recently become more accessible, it shall appear that lands, long treated as gavelkind, had once been held *in capite*, or disgavelled, the gavelkind title can only be supported by resorting to the fiction of gavelling, or regavelling acts now lost having been passed by the Legislature." (3d Rep. of R. P. Commissioners, p. 11.)

* See App. to First Rep. of the Real Property Commissioners,—Mr. Bell's examination.

These are merely given as instances of ordinary and frequent occurrence; and it is obvious, that on all these, and an infinite variety of other matters, which present themselves under the diversified forms of our tenures, and our complicated modifications of landed interest, questions of fact must of necessity constantly occur, as to which it will be impossible for the vendor to produce conclusive evidence. If, on all the evidence that can be produced, a rational doubt still remains, the title is not marketable.

In considering the effect of this evidence, it is frequently necessary to resort to the doctrines of presumption, and to consider how far the circumstances raise a case in which a court of law would consider the presumption in favour of the fact to be so strong that a jury would be directed to find it; for if so, equity will compel a purchaser to accept it. In such cases, it is manifest that a great deal must be left to the discretion of the parties, and in many instances it cannot be doubted that titles are accepted, where the reliance is placed rather on the *bond fides* and responsibility of the vendor, than on the strength of the evidence which he has been able to produce.

*"Mere suspicion, ending in suspicion, is not the legitimate ground of legal decision." (a) In order to show that a [*396] title is defective in point of fact, some reasonable ground of evidence must be shown in support of the objection raised: a mere possibility, that parties may have dealt with an estate in such a manner as to prejudice the title, is not enough, without some evidence to give a colour to the suspicion, that they have done so. Hence, mere suggestions of outstanding reversions, or of legal estates, unbarred entails, &c. do not afford such objections to a title, as equity will entertain.

Thus, in *Sperling v. Trevor*, (b) the title was derived from John Paine, who, in 1693, limited the estate to the use of himself for life, remainder to his daughters in tail, remainder in fee to himself: he had an only daughter E. He made a will, giving all his estate to his second wife, but signed only by two witnesses. After his death, his daughter levied a fine, under which the estate ultimately became vested in Sperling. It was objected to the title, that the ultimate remainder in fee reserved to the settlor, might have been disposed of by him, or by some other person to whom it had descended. Lord Eldon, however, held the objection to be untenable, and decreed specific performance. (c)

*An objection, the same as this *in specie*, and very similar in circumstances, was taken in the late case of *Lapham v. Pike*. (d) The Master reported in favour of the title, to which the

(a) Per Dallas, C. J. so cited, in *Nouaille v. Greenwood*, Turn. 28.

(b) 7 Ves. 497.

(c) It is very justly observed by Sir E. Sugden, "that, notwithstanding the defendant's suggestion, it was highly improbable, that the reversion was disposed of by John Paine in his life-time, such an interest *not being marketable*, and as he devised all his estate by his will, there was no ground to presume that he made another will." (Vend. & Purch. 330, 8th ed.) "This decision," says Mr. Preston, adverting to the same case, "must be understood to contain the qualification, that the purchaser cannot show that there is an outstanding title under the remainder, or reversion in fee. With this qualification, it is reasonable and consistent with all those moral principles which govern the court in deciding on titles. It was founded on the ground, that a mere possibility, which in fact may exist, and not be known to either of the parties, and which in the nature of things cannot be ascertained by either of them, shall not be allowed to operate as an objection to the title." (1 Abst. 256.)

(d) Rolls, Dec. 1831, MS.

defendant took an exception. In 1745, the premises in question were settled to the use of George Perry for life, remainder to his wife for life, remainder to their sons in tail male, remainder to their daughters as tenants in common in tail, remainder to George Perry in fee. The next document in the title was an indenture, dated March, 1756, between Elizabeth, the widow of the said George Perry, then deceased, of the first part; Samuel Whiting and Mary, his wife, the only surviving daughter of the said George Perry by the said Elizabeth his wife of the second part, and trustees of the third part, whereby the parties of the first and second part covenanted to levy a fine (which was accordingly levied) [*398] *to enure to the said Elizabeth Perry for life; remainder to Whiting for a term, if he should so long live; remainder to the said Mary, his wife, for her life; remainder to the issue of Whiting and wife, in strict settlement, with divers remainders over; remainder to the said Elizabeth Perry in fee. Beyond the presumption afforded by these deeds, there was nothing to show, whether George Perry had any other children than Mary Whiting, nor did it appear whether he died intestate. The plaintiff derived his title through the deed and fine levied in 1756; the objection to the title was, that it was not shown that George Perry had not devised away the reversion, nor that he had no other children than Mary Whiting. The plaintiff had searched from 1745 to 1756 inclusive, for the register of the burial of George Perry at the several places at which it appeared, by the deeds, George Perry had, from time to time, been domiciled, but without success. He also searched unsuccessfully for a will, or letters of administration, in the several ecclesiastical jurisdictions, provincial and prerogative, which comprised these localities, and he also made inquiries, equally unsuccessful, of the only one of Perry's descendants, who was known; to elicit a clue for further information, and to ascertain whether or not Perry had been married prior to his marriage with the said Elizabeth, and if so, whether he had any issue by such former marriage.

These searches and inquiries were adduced before the Master by the plaintiff, the vendor, as reasonably [*399] *sufficient to satisfy the scruples of the defendant; and he reported in favour of the title. To this report the purchaser excepted, and the exception was strongly argued before the Master of the Rolls, who overruled it on grounds not noticed by counsel, and therefore it seems unnecessary to advert further to them. "I think," said his Honour, "the objection is not a valid one. I am bound to presume to the same extent as I should were I sitting as a judge at *nisi prius* be bound to direct a jury. If the daughter did not represent her father as owner of the reversion, she had power to destroy that reversion; yet in making the settlement in 1756, the parties dealt with the property as if she had that reversion. It is impossible to presume that she did not know her title: yet she levied a fine when she ought to have destroyed the reversion, if she was not entitled to it. I am bound to presume that as she did not destroy it she herself was the heir-at-law, and entitled to it. She must have known if she was not; and she would have destroyed it, if in any other person. I decide this case upon that point alone, but for that I should have felt great doubt."

It is usual for conveyancers where a title commences with a recovery, to call for the deed creating the entail, for the purpose of ascertaining

that the party suffering the recovery, actually acquired the fee simple: but according to the established practice,—a practice probably analagous to that upon which the two preceding cases were decided,—it is no longer an objection to a title under a recovery *deed made [*400] upwards of sixty years ago, that the creation of the estate tail cannot in point of fact be shown.(e) The same observation applies, where the title commences with a fine, and a deed prepared professedly for barring all estates tail, and no estate tail has appeared. An objection to the title, on the ground that the conuzor in the fine might have been merely tenant in tail, and the reversion or remainder in a stranger, it seems cannot now be supported.(f)

On the same principle, where a tenant in tail with the reversion or remainder in fee by descent, has suffered a fine, it is no objection that he ought to have suffered a recovery, in order to render the title independent of the remainder or reversion in fee,—and consequently of the charges by which they might have been affected in the hands of the ancestor,—unless some existing incumbrance can be shown.(g) Where, however, the vendor is tenant in tail, with remainder or reversion in fee by descent, Mr. Preston says,(h) that “the purchaser may require a recovery to be suffered, at least on offering to pay the expenses of the recovery.”

In all cases, however, of mere suspicion, if the purchaser have reason to think that the vendor is in possession of information respecting the state of the title, which he has not disclosed in the abstract, [*401] or *that he has withheld material deeds, the purchaser is entitled to a discovery from the vendor of all the information he can communicate, and this right may be enforced by a bill in equity, in a suit for specific performance and discovery; or when the vendor has filed a bill, or, the bill being filed by the purchaser, he has had, at the time of filing it, no ground for suspicion, then the same discovery may be obtained under the usual order of reference, that the parties shall be examined on interrogatories, and produce all deeds in their custody, power, &c.(i)

So in *Nouaille v. Greenwood*,(k) the Master had reported in favour of the title, to which exceptions were taken, and the Vice Chapcellor allowed them. The abstract stated a fine levied in Hilary Term, 1741, by John Cooke and Isabella, his wife, of the premises in question; also his will dated June, 1743, in which was a recital “that his wife had passed a fine of all her estate at Tonbridge, and had settled the same in trustees, and had given them a power to raise £400, and to make the estate chargeable with the payment thereof.” The abstract further stated a mortgage in fee, in May, 1746, by Isabella Cooke, her husband being then dead, to one Stowe, and a recovery in Trinity Term, 1746,

(e) 1 Prest. Abstr. 7.

(f) “The prevailing opinion is, that the objection resting simply on these grounds cannot be supported.” (1 Prest. Abstr. 257.) That a purchaser will be compelled to accept an outstanding term instead of a fine in bar of dower. See *Mole v. Smith*, Jac. 490.

(g) 1 Prest. Abstr. 7.

(h) Ibid. 256.

(i) See *Seton on Decrees*, p. 11, for the form of the order; and for some valuable notes on the practice of the court, and the Master's authority under it.

(k) Turn. 26.

[*402] to the use of herself in fee.^(l) It was suggested *on these facts, that as there had been a recovery there must have been an estate tail; and as Stowe, the mortgagee, was not a party to the recovery, the legal estate tail still existed; and that a re-conveyance from him could not be presumed, as he had re-conveyed subsequent to the recovery. Lord Eldon, however, was of opinion, that this was not a valid objection to the title,—not, however, as it would appear, that he did not think the circumstances sufficiently strong to raise the objection; but because, as it would seem, there appeared to his mind to be another presumption, fairly raisable out of the circumstances of the case, which was strong enough to rebut the former:—"The will of John Cooke, in 1749;" said his Lordship, "is evidence that under some fine there was a settlement in trustees; but whether the legal estate was vested in them, or merely a power given to raise a charge on the estate does not precisely appear. Although the expressions are inaccurate, the presumption seems to me, that the legal estate was vested in the trustees. The settlement is not noticed in the deed to lead the uses of the recovery; [*403] but although there is no doubt, that *many recoveries have been suffered unnecessarily, it is reasonable to suppose that this recovery was suffered with reference to the settlement. If then the legal estate was in the trustees, the mortgage in fee conveyed to Stowe only an equitable estate, and then a good equitable recovery might be suffered of the secondary equitable estate, without the concurrence of the mortgagee."

As mere suspicion ending in suspicion is not a good objection to title, so neither is a possibility which ultimately may never ripen into a defect. Hence, the mere fact, that a suit has been instituted subsequent to the contract and is still pending, in which part of the lands are claimed adversely to the vendor, is not a sufficient ground for reporting that a good title cannot be made; for if the mere pending of such a suit were to be a sufficient reason for stating that a good title could not be made, it is pretty obvious that in adverse suits a vendor's chance of getting a decree would be somewhat remote, and that such a ground of resisting performance might always be got up by an unwilling or litigious purchaser. The right course for the Master to pursue in such a case is, not to report against the title, but to state the fact of such a suit being depending, and any special matters connected with it or with its effect on the title, stating also what appears to him to be the effect of these special matters upon the title, but submitting them to the court.^(m)

[*404] *So much for objections to title terminating merely in suspicion. We proceed next to consider a class of cases, where a doubt has been clearly raised on a material matter of fact. Where a title depends upon a fact which, from its very nature, is in-

(l) The abstract also stated a subsequent mortgage, in fee to Sydney Stafford Smyth, (afterwards one of the Barons of the Exchequer) with reference to which circumstance Lord Eldon observed, "at the time of the transfer to Sir S. S. Smyth, there is no evidence that he had all the antecedent instruments before him: but it is a strong thing to say the title was not examined. We ought to give credit to men of eminence in the profession, who were dealing for their own security, and therefore must conceive that the title was not accepted without examination."

(m) Osbaldeston v. Askew, 1 Russ. 160.

capable of proof, the court will not compel a purchaser to accept it; but where the fact is capable of being clearly established, it will depend upon the nature of the proof whether the court will compel the acceptance of the title. Thus in *Smith v. Death*,⁽ⁿ⁾ there was a devise to A for life, remainder to such child or children of A him surviving, "who should be brought up and educated as a member of the established church of England, as A should by deed or will appoint, and in default of such appointment, to the use of the first son of the body of A lawfully begotten, who should be brought up as a member of the church of England, and should be a constant frequenter of the said church of England." The first son attained his age of 21, and joined with his father in suffering a recovery, under which the plaintiff claimed. It was objected to the title, that the contingency was not capable of being satisfactorily proved. Upon this Sir Thomas Plumer said, "that it could not be insisted, that a purchaser was not bound to take a title, which in some measure depended upon matter of fact, for almost every title must depend in some degree upon such matter. That the matter of fact upon which a title depended *might be such as not, in its nature, [*405] to be capable of satisfactory proof, as in the case of *Lowes v. Lush*,^(o) and such a title a purchaser could not be compelled to take: or the fact might, in its nature, be capable of satisfactory proof, and yet not satisfactorily proved; and courts of equity, by assuming a jurisdiction to compel the specific performance of agreements, necessarily forced upon themselves the difficulty of determining such questions; and, that, in the present case, it did appear to him that the fact was capable of proof, and was satisfactorily proved."

In *Lowes v. Lush*^(o) an objection was taken before the Master on behalf of the purchaser, upon a deed executed by the plaintiff with a view, to the sale, as amounting to an act of bankruptcy,—being an assignment of all his effects. The defendant, on his examination, having sworn that he owed no debt upon which a commission of bankrupt could issue, the Master reported in favour of the title. The report was excepted to, and Sir W. Grant allowed the exception upon the ground of its being impossible to ascertain conclusively, whether there was a debt upon which a commission could issue.

A reference to enquire whether there were any such debt was proposed on behalf of the vendor, but this was refused, as affording no security to the title, since the the creditors would not, as in the case of advertisements under a decree, be obliged to come *in, and consequently would not be concluded by the report. And the [*406] bill was accordingly dismissed.

So in a bill for specific performance by the purchaser, it is a sufficient answer to the bill, that he has committed an act of bankruptcy, and a docket has been struck against him, though no commission have issued; because he cannot give the vendor money, which he can be certain of being able to keep, as ultimately it may turn out to be the money of the assignees. Sir W. Grant said, "upon that ground I refused to execute the contract in the case of *Lowes v. Lush*.^(o) There was no defect in the title, properly speaking, but my opinion was, that the party could not

(n) 5 Madd. 371.

(o) 14 Ves. 548.

give the estate, as ultimately it might not be his, but the estate of the assignees. There is here just the same inability to give a secure title to the money, as there was in that instance to give a secure title to the land.”(g)

Fillingham v. Bromley(r) was a suit for the specific performance of an agreement for the sale of an estate called the Juts. This estate had, with several others, been devised to A for life, remainder, in strict settlement, to his sons, with divers remainders over; and there was a power of leasing given to the persons successively entitled, except as to the estate called the Juts, as to which the testator directed, that the persons from time to time in possession, “should not set, let, or lease out the same or any part thereof,” but “should live and *reside on the said estate;” [*407] and for default thereof, he gave and devised all his said lands and tenements to the persons next entitled in remainder, by virtue of his will, “as if such person, so refusing or neglecting to reside or live at Juts aforesaid, had been actually dead.” A, on his eldest son attaining his age, joined him in suffering a recovery of the property in question, and it was afterwards sold and conveyed to the plaintiff. On his agreement for re-sale to the defendant, the latter objected, that there had been a forfeiture of the estate and premises in question by not complying with the testator’s will. It appeared on the result of inquiries before the Master, that A had, in point of fact, for many years previous to the sale, “discontinued to live, reside, or to describe himself as living and residing there, except that he was in the habit of coming there occasionally for a few weeks or months, sometimes with and sometimes without his family and establishment; he had at all times, however, two or three servants at Juts on board wages.” Lord Eldon, in the course of the argument said, “suppose he had been a member of Parliament, and had had a house in London, would you have said that he did not live and reside at Juts? Assuming that there was a forfeiture by the father, there was the son to make a tenant to the præcipe.” His Lordship following up this view of the subject finally held, that, it was impossible to say that there had been any forfeiture, on the ground of the difficulty in knowing what the testator meant by “living and residing.” There is [*408] great difficulty in saying *that a forfeiture was incurred when the court cannot see clearly, what it was the testator meant. I cannot agree to the construction of this will, which has been contended for, that the testator meant merely to prevent the letting of the estate; there are two things which he clearly meant to prevent, one, the letting, the other, the not living and residing. Then comes the question, what is living and residing? occupation is not living and residing; there are many purposes for which the word inhabitant has been taken to include persons, as inhabitants of places, in which they never were. The question comes to this, what it was the testator meant, and whether, unless a clear meaning can be put upon the will, the court is to take upon itself to say that there has been a forfeiture? His Lordship ultimately held the title to be good.

In *Stapylton v. Scott*,(s) the objection turned upon uncertainty as to a matter of fact. It arose upon a will whereby the testator had “devised his undivided moiety or half-part of the dwelling house, &c., and

(g) *Franklin v. Lord Brownlow*, 14 Ves. 557.

(r) *Turn. & Russ.* 530.

(s) 16 Ves. 272.

all *his other shares*, proportions, and interest, (if any,) in the premises, to the defendants upon trust to sell. The devisees sold the whole instead of a moiety,—the question was, whether the testator had actually the whole or only a moiety? The language of the devise at least imported a doubt in the testator's mind, whether he had the whole or not. The cause of that doubt was, it appears, accounted for by the evidence before the Master, who reported in *favour of the title, upon which Lord Eldon observed, "I think the opinion of the [*409] Master in favour of the title right; but the question remains, whether upon the conjecture that this is a good title, a court of equity should compel a purchaser to take it." On the cause coming on upon further directions, he was of opinion that the objection was fatal, and refused to decree specific performance. "The doubt," said his Lordship, "in general cases, has been, not of the same nature as this, but upon matter of law respecting the title; yet if there is as rational a doubt whether in this instance the testator had the entirety of the premises, as if the title was affected by an objection of law, I cannot see the ground for a different principle. Considering this question, first, generally, without the special circumstances, it appears that the testator, who became the owner of the entirety in 1780, made his will in 1801, devising these premises by express description as one undivided moiety; and instead of describing the other moiety, he devises all his other shares, proportions, and interest, if any,—not asserting that he has any,—to trustees to sell; and it appears by a subsequent instrument, on which, however, I do not lay much stress, that the same description followed in each of those subsequent conveyances. Taking the principle to be that, a purchaser shall have a reasonably clear title, can this be so represented? Admitting that it may be explained by extrinsic circumstances, that the testators' doubt can be accounted for, the true question is, Whether this is a reasonably clear marketable title, without that doubt as to the evidence *of it, which must always create difficulty in parting [*410] with it? I am satisfied that it is not."

A complete investigation of the extent to which courts of equity will, in the absence of direct evidence of a fact, enforce the acceptance of a title, depending on presumption, grounded merely on the lapse of time, would lead to a field of inquiry far beyond the limits of the present essay. A reference to the leading authorities, with a few general observations on their effect and tendency, is all that can be attempted here.

As the matters affecting title of which no direct evidence can be given, or of which, from the nature of the transaction, the evidence is very frequently lost, are almost innumerable,—it happens that almost every title is dependent, more or less, on conclusions of fact founded on presumptions resting merely on lapse of time. Old mortgages, for instance, are disclosed on the title, and nothing to show that the mortgage has been satisfied, or the legal estate got in; debts, legacies, or portions may have been charged by old wills or deeds, and the owner of the estate may have no evidence that they have ever been paid, except the presumption arising from the fact that for a long series of years, and in various transmissions of the estate, it has been dealt with as if no such incumbrances had existed. Terms may have been created for these or other purposes, and

there may be a total want of evidence to show whether they have ever been reassigned or surrendered. There may have been conveyances in fee, upon trust *by way of indemnity against possible defects [*411] in the title of other estates, and in the nature of things the indemnity such, that the purposes for which it was given must have been long since fulfilled or become unnecessary; and yet there may be no evidence to show that the legal fee has ever been re-conveyed, and it may have become impossible to ascertain in whom it is now vested. Acts may have been done by parties representing themselves as executors or administrators,^(t) which acts would have been imperfect, unless probate or letters of administration had been duly granted to them, and yet the probate, or letters of administration, or certificate of such having been granted, may not now be producible. In cases of settled estates, parties entitled under ulterior limitations may have taken, by virtue of the death of preceding tenants for life, or tenants in tail dying without issue, and there may be no direct evidence of the death of the tenant for life, or of the death and failure of issue of the tenants in tail.^(u) At an interval [*412] of thirty, forty, or fifty years back, a *distant relation may be represented as taking the estate by descent as heir-at-law, and at the present *day it may be impossible to produce any [*413] direct or conclusive evidence of his pedigree. These, and

(t) 1 Maule and Selw. 380, where, after a lapse of forty years, it was held, that it may be presumed, if necessary, that a person was executor or administrator, who appears to have acted as such.

(u) In Doe v. Griffin, (15 East, 243,) a party was presumed to have died without issue, upon evidence that he had gone abroad when a young man, had afterwards died in the West Indies, and that his family had never heard of his having been married. And see Richards v. Richards, ib. 274, n. So in Doe d. Oldham v. Wolley, (8 Barn. and Cress. 32,) the Court of King's Bench held, under the circumstances of the case, there being no evidence of the party having married, or even of having attained manhood, that after the lapse of 100 years, the death of a party without issue might be presumed, Lord Tenterden, expressly grounded his judgment in favour of the presumption on the fact, that there was no evidence of the party in question having been married. See also Rowe v. Hasland, 1 Sir W. Bl. Rep. 404.

In Dixon v. Dixon, (3 Bro. C. C. 510,) a legatee having been abroad for 28 years, and not having heard of for 27 years, it was held that his death might be presumed. On the order to the Master directing him to enquire, whether *the party in question was living or dead*, the Master merely stated the facts; his report certified that the individual in question had gone to sea 28 years before; that he had been heard of as being in the East Indies about a year after, since which there had been no intelligence of him. Sir P. Arden, (M. A.) referred it back to the Master to review his report *by drawing a conclusion from the facts*; which he accordingly did by stating his opinion, that the legatee in question had died in the testator's lifetime. In Lee v. Willock, (6 Ves. 605,) a similar course was adopted, the petition was presented by the plaintiff Mrs. Lee, claiming under a will two shares of a fund,—one in her own right, the other as administratrix of her son, Charles Lee, upon the presumption of his death. It appeared from the Master's report, that Charles Lee had gone to America, that shortly after his arrival there a letter had been received from him, and that from that time, which was an interval of about fourteen years, nothing had been heard of him. Lord Eldon considered the presumption to be very strong. So in Bailey v. Hammond, (7 Ves. 390,) a sum of £2000 having been bequeathed to the brothers and sisters of the testatrix, living at her decease, or to the child or children of any of them who should then be dead, in such shares and proportions as they would take under the Statutes of Limitation. At the time of the testatrix's death there were several nephews and nieces living, but only one brother; twenty years elapsed without his claiming his legacy, and nothing had been heard of him during that period. On a petition by the administratrix of one of the nephews for a transfer and distribution of the fund, the court made the order accordingly, upon the petitioner entering into a recognizance to refund, in case there should be a claim. And see further Mainwaring v. Baxter, 5 Ves. 458, and Mason v. Mason, 1 Mer. 308, where an issue was directed.

various other cases of a similar description, are constantly occurring, in which those who have to advise upon title have to consider the effect resulting from the application of the principles of presumption,—questions requiring the exercise of the utmost delicacy of judgment, and involving in the result great personal responsibility; the object being on the one hand to see that the purchaser be not advised to act on a presumption which may afterwards prove to be unfounded,—and on the other to take care that he be not advised to hold out tenaciously against a presumption, where the circumstances are such, that a judge would direct a jury to find in favour of it, because in such a case, in the event of a suit for specific performance, the purchaser would probably be saddled with all the costs, but at all events with his own.

How far, therefore, a purchaser, when willing, can be advised to rely upon conclusions resting merely on presumption, and, when unwilling, whether circumstances afford such a degree of strength in favour of it, that equity would compel him to accept a title depending upon them, *are questions to be determined only on a most careful consideration of the circumstances of the case, and of the law as [*414] applicable to them. When the principle of law is clear, the circumstances are often such as to render it a matter of extreme delicacy to draw a just conclusion; for instance, it may, as a general principle, be taken for granted, that if a party entitled to the benefit of an equitable claim lay by for a period of twenty years, satisfaction will be presumed; the rule in such a case is clear enough, but the difficulty lies in the application of it to individual cases, in which very slight circumstances in the conduct or situation of parties will affect its operation. When the principle of law is not clearly settled, the question becomes of course considerably more difficult; as in cases, for instance, relative to presuming the surrender or assignment of out-standing terms, or the re-conveyance of legal estates in fee. In all this class of cases there is no fixed period of time when, nor any given condition of circumstances under which, generally, such re-assignment or re-conveyance may be presumed. Hence, then, where there are out-standing terms or legal estates appearing on the abstract, it scarcely ever happens that a purchaser can be safely advised to rely on the presumption that such terms or legal estates have been got in.

It seems at one time to have been thought by conveyancers, that in questions between vendor and purchaser, the doctrines of presumption were to be applied with great modification, or rather indeed that a purchaser was not compellable to accept a *title, any material [*315] link of which depended merely on presumption.(v) It may be very reasonably thought, that this was the sound way of viewing the subject, when we have regard to the principle of equity, that a purchaser shall not be compelled to take a doubtful title. However that may be,

(v) See Sir Edward Sugden's argument in *Cooke v. Soltau*, (2 Sim. and Stu. 161,) from which it may be inferred that in this eminent lawyer's opinion, there was a material distinction between the case of vendor and purchaser, and others, as to the application of the doctrines of presumption. In the argument of *Minchin v. Nance*, MS. (App. B.) Sir E. Sugden for the purchaser, adverted very explicitly to the same distinction, stating it as one which flowed clearly from the equitable doctrine of doubtful titles, and adverting apparently with dissatisfaction to Sir J. Leach's decisions on the subject; and see what is said by Lord Eldon, (which seems to go to the same effect,) in *Harmwood v. Oglander*, 8 Ves. 129.

the present Master of the Rolls, in a series of decisions involving questions of presumption, has uniformly set himself against this view of the subject; and he may in fact be considered as having established the rule, "that a purchaser must accept a title depending on presumption, where the circumstances are such that a judge sitting at *nisi prius*, would direct a jury to find in favour of it." In *Emery v. Grocock*,^(w) he thus lays down, and argues, the rule: "A court of equity will not compel the acceptance of a title where there is reasonable doubt in law or in fact. In law, strictly speaking, there is no doubt; but practically, there is often a doubt as to the application of settled principles. In matter of fact [*416] there is *doubt, where the testimony is direct, because it may be given *malâ fide*, or if *bonâ fide* by mistake: there is still more doubt where the matter rests in presumption, for all presumptions may be answered. In assuming the jurisdiction of a specific performance, courts of equity are compelled to grapple with these difficulties; and the only rule, that they can adopt in cases of presumption like the present, seems to be, that if the case be such, that sitting before a jury, it would be the duty of a judge to give a clear direction in favour of the fact, then it is to be considered as without reasonable doubt; but if it would be the duty of a judge to leave it to the jury to pronounce upon the effect of the evidence, then it to be considered as too doubtful to conclude a purchaser." To the principles here laid down his Honour has repeatedly declared his adherence, and has uniformly acted upon them.^(x)

On the whole perhaps this may be a convenient state of the law; but at the same time it must be admitted, that besides throwing great difficulty in the way of advising on titles, it is not always very satisfactory for the court to say,—“I think this is a case in which a judge would direct a jury to find in favour of the presumption, and therefore I shall decide in favour of the title;” it would be more satisfactory when such presumption is made, that the grounds of it should be stated clearly [*417] and at *large, which ought to be of so strong and conclusive a nature as to amount to moral certainty.

The foundation of the doctrine of presumption is the principle, that a man will naturally claim what belongs to him. Hence, if he pays off a mortgage debt, or portions, secured by a term, the presumption is, that he will at the same time take a re-assignment or surrender of the term; if, being entitled to a mortgage debt, he abstain for a considerable period of years from making any demand of principal or interest, in the absence of any circumstance to explain this forbearance, the only reasonable conclusion is, that he has been paid,—that the debt has somehow, or other, been satisfied. And though presumption built on this foundation may be frequently against the truth of the fact,^(y) yet it has been declared to be for the ends of general justice, that the presumption should be made, or favoured, and not easily rebutted.^(z) In matters concerning land, or specialty obligation, twenty years, and in matters of simple contract, six years, form, in analogy to the Statutes of Limitation, the period on which courts of equity ground the presumption.

(w) 6 Madd. 57.

(x) In *Cooke v. Soltau*, (2 Sim. and Stu. 163,) “I adhere to the principle of *Emery v. Grocock*.” See also *Pike v. Lapham*, stated in a preceding page, (397,) and *Minchin v. Nance*, MS. (App. B.)

(y) *Eldridge v. Knott*, Cowp. 215.

(z) *Jones v. Turberville*, 2 Ves. jun. 18.

The lapse of time, in raising a ground for presuming a fact, operates by way of evidence. Hence, the denial of the validity of a claim is a circumstance, that rebuts the presumption of satisfaction raised by lapse of time; so will any other circumstance, *which affords a [*418] ground for concluding against its truth. As in *Reeves v. Brymer*,^(a) the obligor of the bond objected that he ought not to be charged with it for two reasons, first, the intention of the obligee to forgive him the debt, and second, that the presumptive bar from length of time ought to operate against any demand upon it. Sir W. Grant, who appears to have been desirous of presuming satisfaction, held clearly that he could not; inasmuch as the obligor's having proceeded upon the forgiveness of the debt afforded in itself sufficient evidence, that it had not been paid, and consequently there was an end of the presumption.

It has been said by a very judicious authority, that presumptions do not always proceed on a belief, that the thing presumed had actually taken place;^(b) and by another not less eminent, that grants are frequently presumed for the purpose, and from a principle of quieting the possession. Both of these observations are very just, but a very slight consideration *will show that they are not applicable [*419] to all cases in which questions of presumption may arise. If the question be one between vendor and purchaser, it is plain, that the court ought not to presume unless it believe; if the question be between a party who has long enjoyed a privilege, or a right, under a supposed valid title, and another party actually entitled, but who has laid by and not enforced his rights; there, on the principle of quieting the possession, it will frequently be a sound administration of law to presume even against belief. Thus in the *Mayor of Kingston upon Hull v. Horner*,^(c) payment of the port duties to the corporation was shown for three centuries. Why were the duties paid, if the parties were not bound to pay them? The corporation produced their title, which was worth nothing; but the jury were directed to presume another grant; subsequent to that which gave them the port without the duty: a strong presumption certainly, but Lord Mansfield, alluding to *Bedle v. Beard*, before Lord Ellesmere,^(d) said it was a right presumption, though it is impossible to believe that such grant had ever been made. So, when the question is, between one party claiming the benefit of an equitable debt or charge and another liable to make it good, if the former have been guilty of great and unexplained delay in enforcing his claim, satisfaction may well be presumed on the same principle, although there be nothing to authorize a belief, that the *debt has been paid, or the charge made good: this [*420] is well illustrated by a case mentioned by Lord Erskine.^(e) "I remember," said his Lordship, "a case before Lord Mansfield, where a mortgagee brought his ejectment; the deeds proved, accompanied with

(a) 6 Ves. 516.

(b) Per Sir W. Grant, in *Hillary v. Waller* (12 Ves. 252.) On the motion for a new trial in *Doe v. Putland*, (Sir Ed. Sugden's Vend. and Purch. 442, 9th ed.) the Lord Chief Baron said, that "he did not think the doctrine of presumption a correct doctrine. It is a very serious point, and of late the doctrine has been carried to a very frightful extent." And Mr. Graham observed, that he had never suffered these presumptions, except in cases very strongly warranted, and where nothing was shown to the contrary. The Chief Baron added, that he never desired a jury to presume where he did not himself believe.

(c) Cowp. 103.

(e) In *Hillary v. Waller*, 12 Ves. 266.

(d) 12 Co. 4.

a bond, all went for nothing. He had not received for 25 years, though living within a street of the mortgagor, any money upon the mortgage, and upon that the mortgage was considered satisfied." His Lordship then proceeded thus:—"It has been said you cannot presume unless you believe. It is because there are no means of creating belief or disbelief, that such general presumptions are raised upon subjects of which there is no record or written muniment. Therefore, upon the weakness and infirmity of all human tribunals judging of matters of antiquity, instead of belief, which must be the foundation of the judgment upon a recent transaction, where the circumstances are incapable of forming any thing like belief, the legal presumption holds the place of particular and individual belief."

On the other hand, as between vendor and purchaser, where the presumption relates to a matter by which the title to the estate might be prejudiced in the hands of the purchaser, no presumption ought to be made, unless the circumstances be strong enough to induce the belief, [*421] that the fact is actually so. If the question *were, for instance, whether satisfaction of a specified charge may be presumed, as against a purchaser, the presumption ought not to be made unless the circumstances be such that ordinarily speaking, a man could not refuse his belief that the charge had been actually satisfied, or that it would never be claimed. The same observation would apply to presuming the surrender of attendant terms, because these being the great instruments of protection from *meene* incumbrances, unless the circumstances afford satisfactory ground for believing that there has been such surrender, it ought not to be presumed on a question between vendor and purchaser; for, if it should afterwards prove, that the term is actually subsisting, it may be made use of by a third person for the purpose of depriving the purchaser of the estate.

Subject to these preliminary observations on the general principles of presumption, the cases on the subject may, for the purposes of reference, be conveniently arranged in three classes: first, as to presuming the extinction of charges(I); second, the grant or release of incorporeal hereditaments and rights(II); and, lastly, the reconveyance and reassignment or surrender of outstanding legal estates or terms(III).

I. *As to presuming the extinction of charges.*—If a party, entitled to a bond or specialty debt, take no steps for enforcing payment, nor otherwise notice the debt for a period of twenty years, it will, in the absence of special circumstances satisfactorily *explaining this [*422] delay, be presumed to be extinguished;(*f*) unless it can be shown that the vendor was in such circumstances that he could not pay, in which case the presumption fails. Thus in *Wynne v. Waring*,(*g*) the obligor in an old bond was known to be distressed during all the latter period of his life, having no property but real estate covered with mortgages; and the Master of the Rolls having directed an action or an issue, upon these and other circumstances the jury thought the presumption rebutted. *Fladong v. Winter*,(*h*) was decided on the same princi-

(*f*) *Oswald v. Leigh*, 1 T. R. 271; *Flower v. Lord Bolingbroke*, 1 Str. 639.

(*g*) Stated in *Fladong v. Winter*, 19 Ves. 198.

(*h*) 19 Ves. 195.

ple; there the debt arose on bonds given to the debtor in India in 1774: they were made payable in 1776 and 1777 respectively. He quitted India in 1775, and died intestate in 1802. Administration was taken by a creditor, against whom in 1803 the usual decree was obtained, under which this claim was brought before the Master by the obligee of the bonds, supported by his own affidavit and the examination of a brother of the intestate as to his insolvency; stating that he lived at different lodgings, and generally that he never had the means of paying this debt. The Master reported in favour of the claim, and Lord Eldon, on an exception to the report, thought "there was evidence enough to preclude him from saying that the Master was wrong," adding "but if you choose to try it, that is reasonable. It is a *pure question of fact for a jury; [*423] and there is too much semblance of evidence for me to decide against the claim. If the expectant will not try it, I shall confirm the report."

Whether the same doctrine applies strictly to a mortgage debt, or whether it is in this peculiar species of transaction to be received with some degree of modification, are points on which the conclusions and the arguments of judicial decisions are somewhat at variance. In *Trash v. White*,⁽ⁱ⁾ Lord Thurlow said, "that if the case was clear that no interest had been paid for twenty years, he had always understood, that it *did* raise the presumption that the principle had been paid; but there must be not only the non-payment of interest but *no demand*." Under the circumstances of the case, however, he referred it to the Master to enquire whether any interest had been paid, with leave to examine the parties upon interrogatories. So in two old cases in the time of Charles the First,^(k) the Court of Chancery relieved purchasers from claims under sleeping mortgages. On the other hand, in the case of *Toplis v. Baker*^(l) in the Exchequer, and anterior to *Trash v. White*, it was held upon long argument and great consideration of all the authorities, that there was no general rule for presuming satisfaction of a mortgage after twenty years or any other period;^(m) and although a jury [*424] might *find a bond satisfied after twenty years, yet where a [*424] bond is a collateral security to a mortgagee, he cannot be prejudiced by that circumstance;⁽ⁿ⁾ and ought in any case to be let in to establish his claim in a court of equity if he could.

The principle upon which the latter view of this question is grounded is this, that though the mortgagor may continue in possession, he is ten-

(i) 3 Bro. C. C. 289.

(k) *Sibson v. Fletcher*, 1 Ch. Rep. 59; *Hales v. Hales*, ib. 105.

(l) 2 Cox, 118.

(m) *Trash v. White*, 3 Bro. C. C. 289, Mr. Belt's n. (1.)

(n) "In *Leman v. Newnham*, (1 Ves. sen. 51) it was said, that in case of a bond a jury would presume payment after twenty years had elapsed without principal or interest paid or demanded, and it was argued that this would be absurd where the bond was a collateral security, unless the mortgage was also supposed satisfied; but the Master of the Rolls denied that the jury would of course presume the bond satisfied; seeming to admit if the jury did find the bond so, this court would in consequence presume the mortgage satisfied: but I doubt of this proposition. If the collateral security had been a note of hand instead of a bond, the Statute of Limitations would run against the note and leave the mortgage as it was. If the jury went on the presumption of the bond being satisfied from there being no payment or demand for so many years, I cannot think that the party would be prevented from showing the truth of the case in a court of equity against such a presumption." Per the Lord Chief Baron in *Toplis v. Baker*, 2 Cox, 123.

ant at will to the mortgagee; that therefore there is no adverse possession, and the mortgagee may at any distance of time assert his title. To this it may be fairly answered, that in point of fact a mortgagor is not a tenant at will in the strict and proper sense of these words; and that, as the relationship of landlord and tenant does not actually exist between them, arguments deducible only from that relationship are not properly applicable to the question. [*425] *Secondly, in order to found a presumption on the ground of satisfaction, adverse possession is not necessary,—it never being necessary to show adverse possession, except where it is intended to set up length of time as a bar under the Statutes of Limitation. When satisfaction of a judgment or bond debt is presumed after a period of twenty years, it is not on the ground of adverse possession, because, in fact, there is none,—the presumption is made, simply because it is not to be thought, that a creditor would suffer his claim to lie so long dormant; and that, as he has made no claim, his delay can only be explained by presuming that he has been paid. The same observations may be made with respect to a legatee,—the reason why the court refuses after a certain lapse of time to assist him, being, not adverse possession, but simply his *laches*. If a legatee, conuzant of his rights, stood by while he saw the legacy paid to another person, or applied in a manner inconsistent with his claims, this would be a case of adverse possession, and after twenty years the lapse of time would operate not by way of evidence and as raising a presumption of payment, but under the statute and as a positive bar. Where the legacy is charged on real estate, the owner of the land is a trustee for the legatee, and the fiduciary relation between them is just of as binding and obligatory a character as that between mortgagor and mortgagee, the relationship differing in form rather than in substance. The whole argument therefore [*426] which is drawn from the notion that the possession of the mortgagor is not adverse, is conceived to be utterly inapplicable, and to proceed from a mistaken view of the grounds on which lapse of time operates, where on the mere *laches* and delay of the parties, it is considered as affording evidence of payment.

Sir Thomas Plumer, adverting to this question in *Christophers v. Sparke*, (o) says “the difficulty I feel is that if twenty years’ possession, without claim on the part of the mortgagee will not operate as a defence against him, I do not see how any period of time, however long, can bar him. If the fiction of the tenancy at will is an answer to the objection after twenty years, why will it not be an answer after any other time? There would be no possibility of stopping. With respect to the mortgagor it is clear, that his equity is shut out by the mortgagee being in possession for twenty years without acknowledgment; then why should not this be reciprocal? Why should it be necessary for the relation to be kept alive in the one case, and not in the other? For these reasons, though I do not give a positive opinion, I cannot agree to the doctrines intimated in the cases I have alluded to. (p) The point, in fact, was not decided in either of these cases; they turned upon particular circumstances.”

In *Christophers v. Sparke*, it was not necessary to decide this point, time under the circumstances of that case being held to raise a pre-

(o) 2 Jac. & Walk. 235.

(p) Cited, *supra*, p. 423, notes (k) and (l.)

sumption that the alleged debt never existed; but it is sufficiently obvious *from the whole tendency of the judgment of the Master of the Rolls, he would have held, that a lapse of [*427] twenty years, without payment or demand of interest, would, if unexplained, have raised the presumption that the mortgage was satisfied.

It is needless to observe that this presumption, like every other resting merely on length of time, and where the possession not being adverse, it cannot operate under the Statute of Limitation, or by analogy to them, may be rebutted by evidence, showing that the mortgage has not been satisfied, and explaining the delay: hence, therefore, if an adequate cause can be shown for not enforcing the demand, the presumption is rebutted, as this circumstance explains the delay. In *Stewart v. Nicholls*,^(g) the mortgage in question was made by deed, bearing date in January, 1790, subject to two former mortgages. On the 6th May, 1794, a commission of bankrupt issued, under which the mortgagor was declared bankrupt. The bill was originally filed on the 19th January, 1811, but no proceedings were taken upon it; on the 9th March, 1825, a bill of revivor and supplement was filed by the executors of the mortgagee. It set forth a former suit by a prior mortgagee, commenced in Easter Term, 1796, in which the usual decree was made for taking the accounts and for foreclosure; but before any further proceedings were had the suit abated by the death of one of the plaintiffs therein in 1811. That suit was revived in 1814. *A receiver had been ap- [*428] pointed in 1803, who paid the balances of the rents and profits from time to time into court. The mortgagor went to America, and in 1824 the Master reported that he was dead. A former mortgagee was in that suit paid off out of the funds in court. The bill of revivor and supplement alleged, that a receiver having been appointed of the rents and profits of the mortgaged premises, and the balances having been from time to time paid into court, and the principal and interest due on the mortgages in that cause mentioned being unpaid, and the mortgagee being then ignorant that the contingent reversionary interest had become vested in the mortgagor as therein mentioned by the decease of his wife and only child, was unable to prosecute his cause with effect in his lifetime, and charged that, under the circumstances aforesaid, and particularly of the mortgagor and his son residing in America, and from the uncertainty concerning him and his affairs, that no presumption of satisfaction of the mortgage arose by lapse of time or otherwise. It was held by Sir J. Leach, M. R., that there was no ground for presuming satisfaction, and his Honour seems to have rested his opinion principally on the fact of the mortgagor having become bankrupt so shortly after the mortgage, and that in consequence there were only four years in which the mortgage could have been paid by the mortgagor. Besides this it is probable that the circumstance of there being two previous mortgages might have had considerable influence with the court.

His Honour proceeded to say, "this court can give no relief if there has been an *adverse* possession for twenty [*429] years; unless the court be satisfied that the rents were applicable to the payment of the mortgage. Would not the possession of the receiver be adverse?"^(r) It seems impossible to contend that the possession of the

(g) Taml. Rep. 307.

(r) Taml. Rep. 312.

receiver could be adverse, he being the mere agent of the court, for the purpose of getting in the rents, and placing them in its custody, for the benefit of the *cestuis que trust*, whoever they might be.

The observation, that the court could give no relief if there had been *adverse* possession for twenty years, seems to have been made with reference to the decision in *Cholmondeley v. Clinton*; (s) and this is confirmed by an observation afterwards made by one of the counsel, that he had looked into the judgment of the House of Lords in that case, and could find nothing in it applicable to the case of mortgagor or mortgagee, upon which the Master of the Rolls is reported to have stated, "that he should certainly never extend it to mortgagor and mortgagee." There is a good deal of obscurity in these remarks, which probably arises from the language of the court and of the bar, being rather concisely reported. The case of *Cholmondeley v. Clinton*, the doctrines of which will be considered by and bye at more length, had nothing to do with this case. The question there was between a person claiming to [*430] be entitled to the equity of redemption and the party actually so entitled, unless his rights were barred by time; the former having for a period of twenty years and upwards, paid the interest on the mortgage while the latter laid by, and the great question in the cause resolved itself into two points; first, whether this payment of interest constituted an equitable disseisin, or in other words an *adverse* possession; and if so, then, secondly, whether twenty years of such *adverse* possession was a bar to the person actually entitled to the equity; and Sir J. Plumer, in a judgment, admirable alike for its copious illustration and force and clearness of argument, decided both points in the affirmative. Such a case clearly had no reference to the question between mortgagor and mortgagee,—in questions of *adverse* possession, such as *Cholmondeley v. Clinton*, the lapse of time operates as a bar, by virtue of the Statute of Limitations; in questions between mortgagor and mortgagee there can be no *adverse* possession, and time therefore operates only by way of evidence, raising only a presumption which may be rebutted.

Legacies are frequently charged on real estate, and paid off without taking proper vouchers of acknowledgment; or they are lost, and when the title comes to be looked into after a lapse of thirty or forty years, no evidence can be given of their having been satisfied. The cases on this subject are not numerous, but were well considered, and are strongly [*431] marked. In *Jones v. Turberville*, (t) the testator had charged all his estate with debts and legacies; the bill was filed for payment by the second husband of a legatee after her death, against the parties in possession of the estate. It was resisted on the ground of presumed payment, arising from the length of time which had elapsed without any demand,—above forty years, and the representatives both real and personal, and all persons who could throw any light upon the question, being dead. To rebut this presumption the plaintiff proved one legacy of ten guineas not paid; he also proved an application to Catherine Williams, one of the defendants, about thirteen years previously, upon which she acknowledged, that she knew the legacy had not been paid, and wondered that they did not proceed against her hus-

(s) 2 Jac. & Walk. 1.

(t) 2 Ves. jun. 11.

band for it, but doubted only whether she or the other defendants were liable to pay the legacies, which she and her attorney thought a proper subject for the opinion of counsel; by her answer she stated, that when called upon she told them that she would have nothing to do with it, and if they troubled her they must take the consequences. At the hearing, however, the relief prayed against her was given up; the leasehold estate in respect of which she had been made a party, and which had been considered a part of the testator's estate, being in point of fact, bound by a settlement, so that he had no power over it. These were all the material facts. The bill was dismissed with costs, upon grounds which are very clearly stated by Lord Commissioner Eyre. "It is now sought," said his Lordship, "to make this estate liable with interest, *to which it ought not to have been liable, in the hands of a person who ought not to have been charged, and [*432] above forty years after this demand ought to have been put in a course of payment. If I could indulge conjecture, I doubt about the payment of these legacies. I know in Wales there is a pious reverence for the representatives of the family; and that the other relations are unwilling to press them; and will take their demands upon them by a little at a time. But the interests of general justice require, that demands should not be afterwards enforced in this way. The evidence is not sufficient to repel the presumption. As to the application to Catherine Williams, evidence of an application to somebody has a degree of weight; but what she said could only be evidence against herself. She said nothing, and could say nothing, that could affect those against whom the decree is prayed; and she had manifested that her estate is not liable. So it only comes to this; that thirteen years ago there was an application. But what happened during the previous period? As to the other witness there is nothing in his evidence that can be considered as evidence, for it is all hearsay from Mrs. Jones and persons of the family against these parties. We are reminded that he said as to one legacy, that it was not paid. With regard to the other legacies or bond debts not being paid, I should have hesitated in considering that as evidence that this was not paid. That one has forborn is no proof, that another has forborn; therefore, I doubt of the relevancy of that evidence. *It is a case [*433] in which the presumption remains not rebutted; and the court is glad to discourage suits under such circumstances as this, commenced by the second husband of this lady after her death, and after the death of all people who could give any account of the affair. I am of opinion, therefore, that the bill ought to be dismissed, and with costs as against Catherine Williams."

In *Pickering v. Lord Stamford*, (u) the testator died in the year 1757, having by his will and a codicil thereto, given the residue of his personal estate for charitable purposes. Lady Stamford, the acting executrix, applied the interest and part of the principal, in the erection of a school; part of the interest was applied in the support of it, and what was not so applied, invested from time to time in stock. In the year 1792, the next of kin of the testator being all dead, the representatives of one of them filed a bill against the executor of Lady Stamford, upon a suggestion that a considerable part of the testator's personal estate was

(u) 2 Ves. jun. 272.

money lent on mortgage, and other real securities, and praying (among other things, having no reference to the subject under discussion) for an account of the personal estate, and particularly of that part, which consisted of money out on mortgage or other real securities, and that the bequest of such part might be declared void and distributable, subject to [*434] the payment of debts, &c. as a resulting trust for the next *of kin. The object of the suit was not so much, that part of the money secured on mortgage as had been actually applied, but that which not having been applied was still in the hands of the representative. And the question was, whether by the lapse of time, a period of thirty-five years, the right to an account was barred? And this turned upon another question, whether acquiescence or a release by the next of kin could be presumed?

The circumstances of the case were these. The testator had, by his will, given legacies to some of the next of kin, which were paid shortly after the testator died, from which it was argued that they must have known the contents of the will, and that having laid by so long, they could not now come for the residue. Another circumstance was that many of the next of kin were inhabitants of the spot where the school was erected, and that their children had received education in it; and on these grounds it was contended, that either acquiescence, or a release, by them must be presumed. An accidental consideration, however, intervened, which was much relied on in argument, and apparently pressed a good deal upon the opinion of the court. It so happened that the decision establishing, that monies on real securities are not capable of being given by will to charitable purposes, had been then very recently [*435] made;(v) and it was insisted, therefore, that it was *unreasonable to suppose that the next of kin could be acquainted with the state of the law, and consequently, that no presumption of acquiescence could be allowed; and this view of the subject seems to have been adopted by Lord Alvanley. After stating, that if this had been the case of a legacy, he should have been of opinion that there was a bar on the presumption of satisfaction, and adverting to the doctrine established by the decision just adverted to, he adds, "the rule might or might not be well known among lawyers at that time. I believe it was; but it could not be expected to be very well known among persons in Cheshire, or that they should be so well acquainted with the law, as to be apprised, that such part only would go to charitable uses as was out on personal securities. This sort of acquiescence does not raise any presumption of satisfaction, nor does it raise any presumption of a release, which certainly might be made." (w) This, as is sufficiently apparent from a careful consideration of his elaborate judgment, appears to have been the only consideration which embarrassed him, his disposition being manifestly very strong to dismiss the bill, if he had felt himself authorised so to do.

Now on looking back at his judgment, it seems very difficult to find a legitimate ground for making the ignorance of the parties as to the state of the law, ground for breaking in upon the wholesome practice of dis-

(v) *Attorney-General v. Meyrick*, 2 Ves. sen. 44, decided by Sir John Strange, in 1750, shortly therefore before the death of the testator.

(w) 2 Ves. jun. 280.

couraging stale demands; *it being notorious, that the courts [*436] are continually acting on principles of law, which are almost universally unknown. How often has the intention of testators been defeated by ignorance of the fact, that three witnesses are necessary for the devise of real estate? how often have parties been deprived of intended bounty by the technical construction of law, as to what words shall or shall not create estates tail? Even within the last few years how many securities have become ineffective, by reason of the decision in *Purdew v. Jackson*;(x) yet have the courts ever permitted themselves to be embarrassed by the real, or supposed ignorance of the parties? By no means. It is the duty of individuals to look after their own rights, and if, in ignorance, they have permitted others for a long series of years to enjoy what they themselves were justly entitled to, it is better that an individual injury should be sustained, than that a general principle of great public convenience should be infringed, or fettered by restrictions and modifications, which render it impossible to advise with any degree of certainty upon its application. There was nothing in the circumstances of the case, but this mere alleged ignorance of the parties to take it out of the principles laid down in *Smith v. Clay*(y); and on the broadest and clearest principles of judicial decision, the bill ought to have been dismissed at the hearing.

*Lord Alvanley, however, although admitting that if he [*437] must have decided the case then, he would have dismissed the bill, directed enquiries as to the application and present amount of the personal estate, and also (among other things) Whether the next of kin had notice of the will, and had released or otherwise relinquished their shares in the residue? upon which the Master reported,(z) "that the next of kin had not released their right, but that they all lived near the testator, knew of the will and the dispositions made by it, accepted their legacies, gave discharges, and saw the manner in which the money was applied under the will, and that some of them worked in building the school, and, lastly, that the trustees had kept their accounts so regularly that there was no difficulty in ascertaining the personal estate at the death of the testator." On the hearing upon further directions, his Lordship after "desiring to be understood by no means to give any countenance to these stale demands," felt himself bound to decide in favour of the plaintiff, "upon the circumstances,—that there was nothing inducing great public or private inconvenience, that the accounts were found, and that the trustees were not called into account for what had been disbursed."

It has been already observed, that the question in this case was, whether there was ground for presuming acquiescence by, or a release from, the next of kin? To the first of these points, namely, whether *acquiescence was to be presumed, Lord Alvanley prin- [*438] cipally directed himself at the hearing, and on the ground of ignorance, which it has been suggested was a very unsatisfactory, if not an unsound principle, he thought, that acquiescence was not to be presumed. As to the second point, namely, whether a release was to be presumed, to use his own words, "he did not then think the case quite ripe," and accord-

(x) 1 Russ.

(z) 2 Ves. jun. 58.

(y) 3 Bro. C. C. 640, Mr. Belt's ed. n

ingly, this is the question principally argued by him at the hearing on further directions, and after a great deal of very elaborate reasoning, he comes to a conclusion in conformity with the Master's Report, that next of kin had not "released this demand." Now with great deference for the authority of this judge, this was not a question which could be fairly raised, because if a deed is never to be presumed in cases, where there is good reason for thinking that none has been executed, it will scarcely ever happen, that such presumption can be made. The true question was not, Whether in point of fact there had been a release? but Whether there was that lapse of time, and those circumstances of *laches*, under which courts, as well of law as equity, presume a grant or release not on the ground of belief, but frequently against belief, and for the mere purpose of quieting the possession?

This subject underwent great discussion in the recent case of *Campbell v. Graham*,^(a) in which Lord Brougham, over-ruling the decision of Sir [*439] *J. Leach, held that after a lapse of seven-and-twenty years, without taking any steps to obtain payment of certain legacies, the parties claiming to be entitled to the benefit of them were too late. The judgments of the Master of the Rolls and the Lord Chancellor differ materially in their principles of decision, that of the former appearing to have gone mainly on the particular circumstances of the case from which his Honour concluded that the presumptive bar growing out of the *laches* of the legatees was rebutted by the situation of the parties; while the judgment of the Lord Chancellor went rather on the general principle, that after a certain number of years satisfaction must be presumed, perhaps hardly attending sufficiently to the fact, that this is a presumption liable to be rebutted by evidence, either direct or circumstantial. That there were some considerable grounds tending to rebut the presumption must be admitted, but attending to the principle, "that these presumptions are to be favoured and not easily rebutted," it would appear that the Lord Chancellor might have rested his reversal of the judgment of the Master of the Rolls very satisfactorily on this ground.

II. *As to presuming grants or releases, matters of record, acts of parliament, &c.*—"One of the general grounds of presumption is, the existence of a state of things which may most reasonably be accounted for, by supposing the matter presumed. Thus the long enjoyment of a [*440] right of way by A to *his house or close over the land of B, which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such rights by the owner of the land; and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter a release of it, is presumed.^(b) On this principle, it has long been established, that the adverse enjoyment of a right of way for twenty years unexplained, and with the acquiescence of the owner of the inheritance, is a sufficient foundation for presuming

(a) 1 Russ. & Mylne, 453.

(b) Per Lord Tenterden in *Doe v. Hilder*, 2 Barn. & Ald. 791.

that there had been a grant of the right of way;(c) so the enjoyment of lights for twenty years, with the acquiescence of the party, who after that time does any thing to impede such enjoyment, affords so strong a presumption of a right by grant or otherwise, that unless the exercise of the right be contradicted or explained, a jury ought to support it.(d) The same principle applies to other subjects of the like nature, the right to the usage or control of water for instance. Thus, in *Wright v. Howard*,(e) in a question on exceptions to title, it is laid down by Sir J. Leach, that "every proprietor who claims *a right, either to throw the [*441] water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment, for twenty years; which term of twenty years is now adopted, upon a principle of general convenience, as affording conclusive presumption of a grant." (f) These subjects are, however, mentioned here only by way of illustration, the law in respect to them being now defined by Act of Parliament.

*In order to constitute a title to a rectory, it must be shown that the impropriation was before the 15 Rich. 2, or [*442] the 4th Hen. 4, or the endowment of a vicarage by tithes, salary, glebe, or otherwise, must be shown; the first of these statutes enacting, that there shall be no impropriation without such an endowment, the second that a vicar should be canonically inducted. Hence, therefore, if one of these alternatives be not shown, the impropriation is void, unless long possession and unequivocal acts of ownership can be shown; for then an impropriation will be presumed. This was decided in the old case of *Crimes v. Smith*,(g) the circumstances of which were these. The abbot of Sulby held the parsonage of Bulbenham, in the county of Leicester, appropriate, which as a parsonage impropriate came to Henry the Eighth by the dissolution of monasteries, ann. 31, who in the 37th year of his reign granted it in fee-farm, under which grant the plaintiff

(c) *Campbell v. Wilson*, 3 East, 301.

(d) *Darwin v. Upton*, 2 Saund. 175 c. n.; *Cross v. Lewis*, 2 Barn. & Cress. 689.

(e) 1 Sim. & Stu. 203.

(f) By the 2d and 3d Wm. 4, c. 71, entitled "An Act for shortening the time of prescription in certain cases," the law on this subject has been considerably modified: it is thereby enacted, that when rights of common and other profits *a prendre*, "except such matters and things as are therein specially provided for, and except tithes, rent, and services," have been enjoyed without interruption for thirty years, such right or profit shall not be defeated by showing, that it was first taken or enjoyed at any time prior to such period of thirty years; but, nevertheless, such claims may be defeated in any other way by which the same are now liable to be defeated; and when such right or profit shall have been enjoyed for sixty years, the right shall be deemed absolute and indefeasible, unless it appear that the same was taken and enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing" (Sect. 1.) There is a similar provision with respect to "any way or other easement, or to any water-course or the right of any water," the corresponding periods being twenty and forty years (Sect. 2.) It is also enacted, that where light has been enjoyed for twenty years without interruption, the right shall be absolute, unless it was enjoyed under a deed or writing for that purpose (Sect. 3.) The 4th and 8th sections direct the mode of computing the before mentioned periods, and prescribe what shall be deemed to be an interruption within the meaning of the Statute. Sect. 5 prescribes the mode of pleading such claim. Sect. 6 enacts that in the several cases provided for by the Act, no presumption shall be made in less than the periods of time mentioned by the act. The 7th section provides for disabilities.

(g) 12 Rep. 4; in the Exchequer Chamber, 30th Eliz.

claimed. The defendant had obtained a presentation of the Queen, and, to destroy the said impropriation, did show the original instrument of it [*443] in the 22nd Ed. 4, with condition that a vicarage should *be competently endowed, and alleged that the said vicarage was never endowed, and therefore void. There was no instrument, nor direct proof, of any endowment of the vicarage. But, on the ground that the said rectory was during all the time of the impropriation supposed, reputed, and taken to be appropriate, and a vicar presented, admitted, instituted and inducted, as a vicar rightfully endowed, and paid his first fruits and tenths, it was resolved by all the court "that it shall be presumed that the vicarage, in respect of continuance, was lawfully endowed; and it shall be of dangerous precedent to examine the originals of impropriations of any parsonages, and the endowments of vicarages, for that the originals of them in time will perish:" and so it was decreed for the plaintiff.

Even against the Crown every thing may be presumed, which is necessary to support ancient and continual possession.(h) Thus, evidence of constant payment, and the production of ancient tables of duties, comprehending the duties in question, have been held sufficient ground to presume against the Crown, a grant of duties on sea-coal imported into the city of London.(i) And a grant or charter from the Crown, which ought to be by matter of record, may under circumstances be presumed, though its supposed date be within time of legal memory.(k)

[*444] This was established *by Lord Ellesmere, in *Bedle v. Beard*,(l) the leading authority on this subject of presuming against the rights of the Crown. The case was thus: Edward the First being seised of the manor of Kimbolton, to which the advowson of the church of Kimbolton was appurtenant, by his letters patent granted the said manor with the appurtenances to Humphrey de Bohun, Earl of Hereford, in tail general. Humphrey de Bohun, the issue in tail, by deed, in the 40th of Edw. 3d., granted the said advowson, then full of an incumbent, to the Prior of Stoneley and his successors; and at the next avoidance, they held it *in proprios usus*. And upon this appropriation made *concurrentibus iis, quæ in jure requiruntur*, after the death of the incumbent, the said Prior and his successors held the said church appropriate, until the dissolution of the monastery in the 27th Hen. 8. The said manor descended to Edward Duke of Buckingham, as issue to the said estate tail; and the reversion descended to King Hen. 8. In the 13th Hen. 8, the Duke was attaint of high treason; in the 14th Hen. 8, the King granted the said manor, &c., with all advowsons appendant, &c., to Richard Wingfield and the heirs male of his body; in the 16th Hen. 8, it was enacted by Parliament, that the said Duke shall forfeit all manors, &c., advowsons, &c. which he had, &c. in 4th Hen. 8. The King, in the 37th Hen. 8, granted and sold for money the said rectory of Kimbolton, as impropriate in fee, which by [*445] mesne conveyance came to the plaintiff; in the *37 Eliz. Beard, the defendant, obtained a presentation of the Queen

(h) In *Goodtitle v. Baldwin*, (10 East, 488,) Lord Ellenborough states it to be the constant habit of the courts to presume grants from the crown on a possession of twenty years.

(i) *The King v. Carpenter*, 2 Show. 47.

(k) *The Mayor of Hull v. Horner*, Cowp. 110.

(l) 12 Rep. 5.

by lapse, pretending that the said church was not lawfully impropriate to the said Prior of Stoneley; because, 1st, Humphrey de Bohun who did grant it to the prior, had nothing in it, for that it did not pass to his ancestor by these words *manerium cum pertinentibus*,—2d, or for this, that he had no more than an estate tail, and then by his death his grant was void.^(m) But it was resolved by Lord Chancellor Ellesmere, with the principal judges, and upon consideration of precedents, that the plaintiff should enjoy the said rectory; “for, although that by any thing which can be now shown, the impropriation is defective, for by nothing which now appears, the issue in tail had any thing in the advowson at the time of his grant to the said Prior, for that the advowson did not pass by the grant of the King by those words, ‘*cum pertinentibus*,’ yet it shall be now intended, in respect of the ancient and continual possession, that there was a lawful grant of the king to the said Humphrey, who granted in fee; so that he might lawfully grant it to the said priory. And all shall be presumed to be done, which might make the ancient impropriation good; for ‘*tempus est edax rerum*’; and records and letters patent and other writings, either consume, or are lost, or embezzled, *and, God forbid, that the ancient grants and [*446] acts should be drawn in question, although that they cannot [*446] be shown, which at first was necessary to the perfection of the thing; and, if the impropriation had been drawn in question in the lifetime of any of the parties to it, they might have shown the truth of the matter; but after the death of all the parties, and after so many succession of ages, in all which the said church was esteemed and allowed to be rightfully impropriate, if any objection or exception should now prevail, the ancient and long possession of the owners of the said rectory should hurt them; for, if these objections or exceptions had been made in the lives of the parties, without any question they had been answered, or otherwise, in so many successions of ages it would have been impeached or impugned.”

In the case of the advowson of Chester-le-Street,⁽ⁿ⁾ the manor had been granted by the crown, with an express exception of the advowson. Lord Mansfield, on two presentations and a possession of about 150 years, directed the jury to presume a grant from the crown.^(o) It must

(m) This was the doctrine at that day (Litt. sec. 613,) but it has now long been settled that a grant in fee by tenants in tail is voidable only, not void by his death. (Machell v. Clarke, 2 Lord Raym. 778.)

(n) Powell v. Milbanke, Cowp. 103, n.

(o) On this case being cited in Gibson v. Clark, Lord Eldon observed, “that Lord Mansfield used to say, that it was one of the best decided cases, but Lord Chief Baron Eyre said that, if it was law, presumption was run mad.” (1 Jac. & Walk. 161, n.) In the argument in Harmwood v. Oglander (8 Ves. 129, n.) his Lordship remarking upon the same case, as an instance of the length to which the doctrine of presumption had been carried, observed, that the direction in that instance to presume a grant was very dangerous if there was nothing more than mere enjoyment, and a great length of time under two presentations stolen from the crown, especially with reference to the maxim “*nullum tempus occurrit regi*.” It may be thought from this last objection that, in Lord Eldon’s opinion, advowsons are not within the operation of the “*nullum tempus*” act (9 Geo. 3, c. 16,)—a point not yet decided, and by no means clear upon principle; for, as it may be contended, that the statute does not apply to advowsons, inasmuch as it bars the crown’s right only, where the subject of the claim has not been put in charge for 60 years, it would seem reasonable to conclude, that as advowsons cannot be put in charge, they were not included in the act; on the other hand, the act expressly extends to all hereditaments, under which the term advowsons must be in-

[*447] be admitted, however, *that this was a very strong decision, and that probably the court went the utmost possible extent in presuming the grant.

In *Gibson v. Clarke*,^(p) the Master having reported in favour of the title, an exception was taken by the purchaser as to the title of the advowson of Belford, part of the premises comprised in the purchase. The objection was, that no grant from the crown of the advowson was shown. It appeared that King Henry 8, by letters patent of the 37th year of his reign, granted to A, and his heirs, "all the house and scite of his late cell, or of his monastery of Bamburgh aforesaid, with all its rights, members, and appurtenances in the county of Northumberland,

[*448] to the *late monastery of St. Oswald, in the same county, then dissolved, formerly belonging; and all and all manner of tithes of corn, grain, and hay, yearly growing and renewing upon the lands, &c. in Bamburgh aforesaid; and also all and all manner of other tithes whatsoever yearly growing or renewing in Bamburgh aforesaid, and to the chapel of Belford' belonging, and to the same late monastery formerly belonging; except always, and to the king and his successors reserved, all and singular the advowsons, donations, presentations and rights of patronage whatsoever to the said cell and premises belonging or appendant." There was also a grant by letters patent of the 8th James 1st, of all those the tithes of sheaf and grain coming and renewing in the whole town of Belford, with a reservation to the crown of all and singular advowsons, donations, free dispositions, and rights of patronage, and of all and singular rectories, churches, vicarages, chapels, and all other ecclesiastical benefices whatsoever, to the premises or any part thereof, in anywise belonging, appertaining, incident, appendant, or incumbent.

The vendor's title to the tithes was derived from these grants. The manner in which the advowson had been acquired did not appear; it had been included in a recovery suffered in 1709, by parties who rested their title upon the will of A, dated in 1681, by which the manor and tithes were devised, but the advowson was not mentioned; it had afterwards been comprised in several conveyances, fines, and recoveries. In

[*449] 1774 the curacy of the chapel of Belford *was augmented, with the consent of the governors of Queen Anne's Bounty, by the then patron, (under whom the vendor claimed;) and three presentations had been subsequently made by him and his representatives. In the episcopal registry no presentation was to be found earlier than the first of these; and it was supposed to have been a donative till then, and it was so styled in the Lib. Regis; no evidence of any previous nominations was produced. Lord Eldon said, "if the title of this family be evidenced by conveyances and deeds for a period of nearly 140 years, and there have been three presentations by them and none by the Crown, I am of opinion that this is a case in which a grant would be presumed," and accordingly overruled the exception.

Even an Act of Parliament, may be presumed, though in such a case

cluded, and in the 9th section the rights of the crown to the manors, advowsons, &c. of the Savoy are excepted from the operation of the act, from which the reasonable inference is, that the act was intended to comprise advowsons situated elsewhere.

(p) 1 Jac. and Walk. 159.

that no record should be producible, if ever it was in existence, is still less likely, than in the instance of a grant from the Crown;(q) and such presumption may be made even against the Crown. Thus, in the recent case of *Lopez v. Andrews*,(r) on the trial, at the Devon Summer Assizes for 1826, of an action of trespass for mining under lands between high and low water-mark, in a navigable river,—parcel of the Duchy of Cornwall,—of which, by reason of the Parliamentary charter of 11 Ed. 3, a valid grant could not have been made *without an Act of Parliament, Littledale, J., told the jury, that they were [*450] at liberty to presume an Act of Parliament, and that direction was approved of by the Court of King's Bench, on a motion for a new trial, which was refused.

It has been already observed, that the court will adapt the nature of the presumption to the exigencies of the case.(s) Hence, if necessary to support a title evidenced by long possession, a right of perpetual renewal of a lease will be presumed. Thus in the *Att. Gen. v. The Bishop of Ely*,(t) which was an information at the relation of the Vicar of Stradbroke, Suffolk, against the Bishop of Ely, praying that the bishop might be decreed to grant the relator a lease of the corn, grass, and hay, throughout the parish of Stradbroke, for a term of 21 years, from the 5th Oct. 1826, at the annual rent of £8, and a fine of £63. The circumstances were these: In 1682, the then Bishop of Ely, as impropriate rector granted to the vicar of Stradbroke a lease of the tithes of corn, grass, and hay, for twenty-one years, at a rent of £8, and a fine of 100 marks. At the expiration of that term a similar lease was granted to the then vicar, at the same rent and fine, and so on from time to time until the last of such leases expired on the *5th Oct. 1826. [*451] The leases in question comprised the whole profits of the impropriate rectory. The vicar founded his title on the letter of Charles the Second, dated the first of June, in the 12th year of his reign, addressed to bishops, deacons, and other ecclesiastical persons, who might be impropriate rectors, and urging the augmentation of vicarages; and upon the Statute of 29 Ch. 2, s. 8, which made such augmentation perpetual. The words of the letter, so far as is material to this point, were as follows:—"Our will is, that no lease be granted of any rectories or parsonages belonging to your see, or belonging to you and your successors, until you shall provide, that the respective vicarages or curates' places where there are no vicarages endowed, have so much revenue in glebe, tithes, or other emoluments, as commonly will amount to £100 or £80 per annum, or more, if it will bear it." The act is entitled "an act confirming and perpetuating augmentations made by ecclesiastical persons to small vicarages and curacies;" the preamble recites the King's letter, and the first enacting clause provides, "that all and every augmentation of what nature soever, granted reserved or agreed to be made payable since the 1st June, in the 12th year of His Majesty's

(q) *Eldridge v. Knott*, Cowp. 215.

(r) Stated in Mr. Hayes's *Concise Conveyancer*, p. 11.

(s) Thus it seems after long enjoyment under an admittance to a copyhold, a surrender not entered on the Rolls may be presumed (*Wilson v. Allen*, 1 Jac. & Walk. 611;) and on the same principle, a grant of enfranchisement of copyhold may be presumed even against the Crown, (*Doe v. Ireland*, 11 East, 280.)

(t) 4 Ross. 102.

reign, shall be deemed and adjudged to continue and be, and shall for ever hereafter continue and remain, as well during the continuance of the estate or term upon which such augmentations were granted, reserved, or agreed to be made payable, as afterwards, in whose hands so-

[*452] ever the said rectories or portions of tithe "shall be or come." The vicar insisted that it was to be presumed, that in obedience to the King's letter, a lease similar to that of 1682 had been made in 1661, by the then Bishop of Ely, for 21 years; that by force of the statute the vicar acquired a perpetual right of renewal of such lease; and that the lease of 1682, and all subsequent leases, were granted by that right. Sir J. Leach, M. R., was of this opinion and decreed accordingly. He thus argues the point of presumption:—"The remaining question is, whether, in the absence of direct evidence of the fact, it is reasonable to presume in this case, that a similar lease had been granted in pursuance of the King's letter. The coincidence of time is remarkable. The King's letter is dated the 1st June 1661. A lease, granted in obedience to it, would probably have commenced at Michaelmas, 1661, and determined at Michaelmas, 1682, which is the commencement of the lease in question. The lease itself expresses, that it was made with the intention of granting an augmentation to the vicar. For the defendant it is argued, that the covenants in the lease do not fit the case of perpetual renewal. The answer is, that the first lease was a temporary grant only, and had therefore the proper form of such grant; and the statute conferring only the perpetual right of renewal the form must necessarily remain the same. The objection, that a lease in 1661 is not to be presumed, because it is not mentioned in the bishop's book, which extended to 1662, is of little weight. The lease, though commencing retrospectively in *October 1661, might not have been actually executed till after March 1662. But if the books had been regularly preserved, and no entry of any lease had been found in them, I am of opinion that such omission would have had no weight in opposition to the presumption of right, which arises from an uninterrupted possession of nearly 150 years; and that it would have been the duty of the court to come to the conclusion, that a lease similar to that of 1682 had been previously granted in obedience to the King's letter, and that the 29 Car. 2, conferred upon the vicars, for the time being, a perpetual right of renewal of such lease."

THERE is no application of the doctrine of presumption more important than that which has reference to the title of tithes. It is, however, a subject surrounded with difficulties, in consequence of the ecclesiastical prerogative "*nullum tempus occurrit ecclesie*," though they have been somewhat diminished in certain cases, by an act passed in the late session of Parliament (2 & 3 W. 4, c. 100.) Previously however to considering the cases on this subject, a few general remarks will be submitted on the nature

OF THE TITLE TO TITHES,

And in treating this it will be convenient to divide it into two heads: First, of the title to lands sold tithe-free [I.]; and Secondly, of the title to tithes as a distinct and separate inheritance, severed from the

land [II.]; although it is to be observed, *that great part of what will be said with respect to the former, applies equally [*454] to the latter.

I. "Whether an estate be free from, or subject to tithe, is not a question of title but of fact. If a vendor represent, that he has a good title, and that the estate is tithe-free, the question, Whether tithe-free? is not a question of title, but a question, Whether the estate held by a good title, is also held free from tithe? If the purchase were of lands and of tithes, then the matter of tithes would be matter of title."^(u) In other words, if a vendor sell an estate as tithe-free, he must show that the lands in question by some of the means applicable to that purpose, have been discharged. If he sell the estate and also the tithes, then he is as much under obligation to show a title to the tithes, as he is to show a title to the land.

Where lands sold are alleged to be tithe-free, the vendor has to make out a question of fact; and therefore if he be compelled to resort to a suit in Chancery to enforce his contract, and this be the only point in dispute, the court will not, on the coming in of the answer, without the consent of the defendant, refer it to the Master to inquire whether the estate be tithe-free,—this being a question which the Master never looks into on a reference upon the title; it is a mere question of fact to be determined upon the evidence in the cause.^(v) At common law, all land is equally charged with tithes; not a single acre *being exempt from [*455] payment. From the earliest periods, tithes were every where due to somebody; even in extra-parochial places they are payable to the king. And though when in spiritual hands no tithes were paid, that was from the rule "*ecclesia decimas non solvit ecclesie*," and not from any non-charge inherent in the land. The land was still liable though the payment was suspended.

Tithes are payable to the parson of common right, unless there be a special exemption; and the vendor alleging, that the estate sold is tithe-free, must show by what means it is exempted. Previous to the dissolution of the monasteries, lands in the hands of a layman could be exempted from the payment of tithes only by real composition or by *modus*; but in the hands of spiritual persons, they might be exempted by these, and also by certain other means peculiar to spiritual persons, and thence called privileged exemptions. These were the Pope's bull of exemption,—unity of possession, as when the rectory of a parish, and lands in the same parish had both immemorially belonged to a religious house,—by prescription,—*ratione ordinis*, in the case of the knights templars, hospitallers, Cistercians, and the *præmonstratenses*,^(w) whose lands were privileged by the Pope with a discharge of tithes.

As all lands originally were chargeable with *tithes, the [*456] privilege by prescription must have been originally founded in a grant; and although no grant be producible still a grant is to be presumed, and it must also be presumed that the grant was made as it ought to be: that is to say, that it was made to the spiritual body and their suc-

(u) Per Lord Eldon, in *Smith v. Lloyd*, 3 Swanst. 224, n.

(v) *Wallinger v. Hilbert*, 1 Mer. 104.

(w) The privilege of exemption, when claimed by persons merely *ratione ordinis*, was restricted to lands in their own manurance and occupation, (*Younge v. Naylor*, 2 Eag. & You. 349; *Slade v. Drake*, Hob. 296.)

cessors for spiritual purposes, and so as not to enable them to alien: if the grant were made otherwise, it was a transgression of the law, as, by such alienations, the church might have been entirely stripped of its possessions without any provision being made for the performance of its duties. It is on this principle, that, unless there be strong evidence against it, the courts have always supposed such grants to be so made, that when the bodies were dissolved, the benefit of them would not pass to the crown or its grantee. Hence, when the Alien Priories(x) were dissolved in the 2 Hen. 5, and the lesser monasteries in the 27 Hen. 8, the prescriptive exemptions of their respective possessions from tithe fell to the ground, as would those of the greater monasteries on their dissolution, had it not been for the saving clause in the 31 Hen. 8.(y)

If lands exempt from tithe, *ratione ordinis*, be leased, the privilege of order is suspended only, *though, if absolutely parted with, [*557] it is lost.(z) The analogy prevails with respect to the crown; it has the privilege of prescribing, but, in the hands of its grantee, the lands become liable again, the courts not presuming that there was any durable exemption, but referring it to privilege only, which by the alienation is gone.(a)

Hence, therefore, it follows that lands in the hands of a layman can only be exempt from tithes; first, by virtue of a composition real; second, by payment of a *modus*; third, in certain cases, as part of the possessions of the greater monasteries; and fourth, by act of parliament, as by a provision in an Inclosure Act,—which last head of exemption is not intended to be farther adverted to here.

1st. *By composition real*.—In order to establish exemption on this ground, it is necessary to produce evidence of the actual existence of the deed of composition at some time, and it is not sufficient to show non-payment merely, as evidence of the loss of such a deed; for, allowing such evidence, every real composition might be turned into a *modus*.(b)

A composition real was an agreement between the owner of the lands, [*458] and the parson or vicar, with the consent of the ordinary and patron, *that such lands should, for the future, be discharged from payment of tithes, by reason of some land, or other *real* recompence given to the parson, in lieu and satisfaction thereof. It being found by experience that this did not afford sufficient protection to the church, the disabling statute of the 13 Eliz. c. 3, was passed, which prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches for more than three lives or twenty-one years. Where a party relies for exemption from tithes on a composition real, the better opinion seems to be, that a *money* payment may be a *real* composition, just as well as if the recom-

(x) For information concerning them, see Account of the Alien Priories, London, J. Nicholls, 1779, in which the number of them is stated to be 146: and it is said by Matthew Paris, that their possessions were equal in value to those of the king.

(y) See *Sydowne v. Holmes*, Cro. Ch. 422; 8. C., Sir W. Jones, 368, a case of great authority, in which the question relative to the lesser abbies was much considered.

(z) *Cowley v. Keys*, 4 Gwill. 1308; 3 Eagle & Y. 1351.

(a) *Page v. Wilson*, 3 Jac. & Walk: 532.

(b) *White v. Lisle*, 3 Swanst. 347; *Knight v. Halsey*, 2 Bos. and Pull. 172; 1 Eden. 303, n. and the cases there cited.

pence consisted of *land* or some *charge* thereon. There are great authorities, however, both ways, (c) and if a vendor, alleging that the estate was *tithe-free, should, in proof of that, offer evidence of a composition real, the consideration being only a [*459] *money* payment, it is submitted that the purchaser might refuse to complete, on the ground of its being doubtful whether such a consideration was good.

2d. *By modus*.—No discharge from tithes can be supported by the payment of a *modus*, which had its origin within legal memory, or whose origin can be traced to a real composition. An occupier of lands, sued for tithes, cannot insist on a pecuniary payment as a *modus*, and at the same time as a real composition, they being essentially different; a *modus* may, perhaps, originate in a real composition, but must be proved to have existed from the time of legal memory; a real composition may have been made within that time by an agreement with the parson under the sanction of the ordinary, before the restraining statute. What does or does not constitute a good *modus*? and, by consequence, whether the alleged *exemption be or not established? or whether under the circumstances there be any considerable [*460] doubt as to the validity of the *modus*, and consequently the title unmarketable? are questions for the decision of which, when they arise, reference must be made to the treatises on tithes.

Adverting to the great difficulty of substantiating a *modus*, or an absolute exemption from the payment of tithes, a vendor should always exonerate himself by a provision in the particulars of sale from the liability to make the necessary proof. For in almost all cases of the kind, where the question has not been set at rest by the decision of a court of competent jurisdiction, in a suit by parties capable of binding the right, the purchaser may put the vendor to very great trouble and expense, or very probably escape from the contract altogether, a title being clearly unmarketable where any reasonable doubt can be raised as to the validity of the *modus* or alleged exemption.

3rd. *That the lands in question were part of the possessions of the greater monasteries dissolved by Henry 8, and were by them held*

(c) Lord Hardwicke, in the case of the Attorney General v. Bowles, (3 Atk. 808,) said, that "*real composition* does not mean any substantial permanent security for the payment of the composition, but *land* substituted in lieu of tithes or a rent-charge issuing out of *land*; and that this, though a mere *obiter dictum*, was his settled opinion, see Ekin v. Piggott, 3 Atk. 298.

Gibson, however (in his Cod. tit. 30, c. 5,) Watson, (Cl. I. 501,) and Degge, (pt. 2, c. 20,) agree that a composition, in consideration of *money* payments, may be a *real composition*, just as well as if the recompence to the incumbent consisted in, or arose out of lands. They also say that any other thing rendered or done for the ease, profit, and advantage of the parson or vicar, to whom the tithes did belong, may constitute a real composition. A great majority of the twelve judges, (if indeed any one was dissentient as to this point,) appear to have considered this a just account of the meaning of the word, in Knight v. Halsey, (2 Bos. and Pull. 205.) It had been so held long before, by the Court of King's Bench, in the case of Sydowne v. Holme, (W. Jones, 369,) as well as by Mr. Justice Reynolds, in Chapman v. Monson, (Mosely, 286,) with whom, as appears by a report of the same case, in Fitzgib. 120, Lord King, C., and Mr. Justice Fortescue agreed. Such also was apparently the opinion of Chief Baron Eyre, in Hawes v. Swayne, (2 Cox, 179,) as it clearly was of Baron Wood, in the case of Bennett v. Neale, (Wightw. 359.) And that in Lord Eldon's opinion, a money payment may be a composition real, seems a necessary inference from several passages of his Lordship's judgment, in White v. Lisle, (3 Swanst. 342.) See Hov. n. (27) to 2 Black. Com., whence the substance of this note has been adopted.

free from the payment of tithe.—In order to establish an exemption from tithe on this ground, it must be shown by competent evidence, *(d)* that the lands, in respect of which the exception is claimed, were, before and at the time of the Council of Lateran, *(e)* part of the possessions of *some of the greater monasteries dissolved in the reign of Henry 8; and it seems that usage, which cannot be legally accounted for on any other hypothesis, will be held to afford such competent evidence; *(f)* it must also be shown that the lands in question remained in the possession of the monastery till the time of its dissolution; *(g)* for then, if there be no evidence of the payment of tithes of those lands at any time, they will be presumed to have been discharged by some means or other, before the dissolution; *(h)* and in order to have the benefit of the exemption, it is not necessary to show in what manner the discharge originated, it having been resolved in *Nash v. Molins*, *(i)* to be sufficient to prove, that the prior held the land discharged, “and if he held it discharged *non refert*, by what means; for it shall be intended by lawful means.”

On the dissolution of the monasteries, all the exemptions enjoyed by them, merely in their spiritual capacity, that is to say, their exemption by bull, by unity of possession, by prescription, and *ratione ordinis*, would have fallen to the ground, had they not been supported and upheld by the 31 Hen. 8, c. 13, by which it was enacted that the King and his grantees should “enjoy their possessions discharged of tithes, in as ample a manner as the abbots held and enjoyed the same,”—a provision, which *has been held to extend only to such possessions as vested in him by the subsequent act of 32 Henry 8, c. 24; *(h)* and hence, therefore, if the lands alleged to be tithe-free, have been part of the possessions of the lesser monasteries, evidence must be given of an absolute discharge from tithes by real composition, for in the absence of such evidence, the presumption of law is, that the discharge “was rather by grant of privilege, than by any real composition.” *(l)*

Of the privileged exemptions above alluded to, it will only be necessary here to advert to those by unity of possession *(1)*, and by prescription *(2)*; it being in respect to these only that any question is likely to arise in the investigation of modern titles.

1. Unity of possession is, where the right to the rectory, and the occupation of the lands liable to pay tithes, are in the same person. When this happens, a suspension of the payment of tithes necessarily results, during the continuance of this joint possession. In order, however, to exempt the lands from the payment of tithes, this union must have existed in fact, or according to legal presumption, from time immemorial; and unless it have been immemorial, the rector's right to the pernaney of the tithes will result, whenever the possession is severed. *(m)* In a case of this sort, where the union has not been from

(d) *Markham v. Smyth*, 11 Price, 131.

(e) *Staveley v. Ullithorne*, Hard. 101.

(f) *Donnison v. Elsley*, M'Clel. and You. 24.

(g) *Norton v. Hammond*, 1 You. and Jerv. 108.

(h) *Lamprey v. Rooke*, Amb. 291.

(i) *Cro. Eliz.* 206.

(k) *Whitton v. Weston*, Sir W. Jones, 182; *Star v. Ellyot*, Freem. K. B. R. 229; *Fosset v. Franklin*, T. Raym. 225.

(l) *Sydowne v. Holme*, Cro. Ch. 423.

(m) *Fox v. Bardwell*, Com. 511.

*time immemorial, the tithes remain as a subsisting separate inheritance, notwithstanding the temporary suspension of [*463] the payment of them; and, consequently, where there was a previously subsisting *modus*, though its payment would be suspended, it would not be destroyed by such unity of possession. (n) To constitute, therefore, an exemption from the payment of tithe, on the ground of unity of possession, this unity must be shown to have existed from time immemorial. (o) If, however, there be no evidence of tithe ever having been paid, and it be not shown that the union of possession commenced within time of memory, evidence of the unity of possession at the time of the dissolution in the reign of Henry 8, will be sufficient to ground a presumption of its having been immemorial. (p)

2. As to the exemption by prescription, this was a privilege purely personal, and could be claimed only by the king in virtue of his prerogative, and by ecclesiastical persons or corporations in their spiritual character. It is hardly adding any thing to the extent of this proposition, to say, that tenants under lease, or copyholders in fee, under the king, or an ecclesiastical person, would be entitled to prescribe in *non decimando*, in the right of the king, or ecclesiastical person, as landlord in the case of tenants,—or as lord of *the manor, in case of [*464] copyholds. On an absolute alienation, however, the right to [*464] prescribe is absolutely gone, and cannot be revived, although the lands should afterwards come back into the hands of the king, or ecclesiastical person; (q) for with all spiritual bodies, the privilege ceases when the body is dissolved. Thus in the case of the Dean and Canons of Windsor, (r) where “a prescription was shown of a discharge of tithes in an abbot, prior and convent, and that the corporation was afterwards dissolved, because all the monks died, and the abbot also; it was holden by the court, that he who is now owner of it, and holdeth the lands, shall pay tithes, for a layman cannot prescribe in *non decimando*; and the prescription continues no longer than the land continued in the abbot and convent’s hands.” In Degge’s Parson’s Counsellor, (s) it is laid down, that if lands belonging to any of the lesser monasteries, and discharged by order, had been granted by the king to one of the greater monasteries, they would not retain the exemption, the right to tithe reverting to the parson immediately upon the dissolution; and the greater monastery would not therefore hold them discharged. So in a case of *Bolls v. Atkinson*, (t) where the abbot of Abingdon, being seised of land discharged by prescription, granted it to All *Souls’ College. [*465] It was held that the discharge was gone, for it could not be intended to be a real composition, not being pleaded, or found to be so; but that it was a mere prescription and personal to the abbot, and did not run with the land.

A layman can make no title to tithes by prescription; for they could

(n) *Chambers v. Hanbury*, Mo. 528.

(o) Case of the Abbot of Tewkesbury, cited in *Prowse’s case*, 4 Leon. 47.

(p) *Doubitofte v. Curtsene*, Cro. Jac. 454; and see *Peake’s Law of Ev.* 416.

(q) *Bishop of Lincoln v. Cooper*, Cro. Eliz. 216, is the only authority, which seems to impugn this doctrine; but for an explanation of the principle of the decision in this case, see *Page v. Wilson*, 2 Jac. & Walk. 530.

(r) *Godbolt*, 211.

(s) 1 Lev. 185; 1 Sid. 320.

(t) p. 332.

only have come into the hands of a layman by grant from the crown in, or subsequent to, the reign of Hen. 8. The tithes which he claims must, of necessity, have been part of the possessions of some of the dissolved monasteries. If therefore he can produce the grant, or give sufficient evidence that there had been one, his title is good as against the rector, or parties claiming in respect of the rector's rights, if there be no evidence of tithe ever having been paid. If he cannot produce the grant, or evidence that there was one, then he must show, that the lands in question were part of the possessions of the greater monasteries, and in their hands exempt from payment of tithes; or, he must show that the tithes have been released or granted to some owner of the land. Upon this last ground of title a question of great difficulty arises, from the circumstance of its having been constantly held by the courts, that mere non-payment or retainer affords no reason for presuming a grant or release; because it is said that mere non-payment or retainer amounts to nothing more than a prescription in *non decimando*; and "that such a [*466] prescription," to adopt the language of Baron Eyre, (u) "is simply *unlawful. If no tithes have been paid, a title founded on mere non-payment is simply a prescription in *non decimando*. Evidence of length of possession the court can pay no regard to, for the possession must have been unlawful; and the court is therefore bound to decree in favour of the common right. No presumption can be admitted to support a mere simple prescription in *non decimando*." This doctrine so expressed assumes two things which seem to rest on very slender foundations. 1st. That mere non-payment is simply a prescription in *non decimando*; a proposition which, if fairly considered, would probably be found to have very little meaning. 2nd. That the possession must have been unlawful, which is not true, as the lay rector might have granted or released the tithe to the owner of the land.

It will be convenient to bear in mind that the title to tithes in the hands of a layman branches out into three distinct divisions:—

1st. The title to lands exempt from the payment of tithes;

2nd. The title to tithes in perannuity,—as where the owner of the lands is also the owner of the tithes;

3rd. The title to the tithes only;

In these two last cases the title to the tithes is distinct from the title to the land, but in each case *the tithes in question are called [*467] 'a portion of tithes,' the nature of which is thus explained by Gibson. (v) After stating that, "tithes of common right belong to that church, within the precincts of whose parish they arise," he proceeds thus:—"Notwithstanding the common right of parochial tithes, one parson may prescribe to have tithes within the parish of another; and these are called Portions of Tithes. Upon this foundation it is, that a layman may prescribe to have a portion of tithes within a parish *by grant from the Crown*, laying the prescription in some of the dissolved religious houses who were possessed of them, from whence they came to the crown, and from the crown to the patentee."

(u) *Scott v. Airey*, 3 Gwill. 1174; and see *Nagle v. Edwards*, 3 Anstr. 702; *Lord Petre v. Blencoe*, ib. 945; the *Corporation of Bury v. Evans*, Gwill. 767; the three last cases are the great authorities in support of this doctrine.

(v) *Codex*, 663.

This word "prescribe" as applicable to a layman's title to tithes, has led to a great deal of confusion. A layman's title to tithes is altogether independent of prescription. He cannot prescribe; for that is a privilege peculiar to ecclesiastical bodies and the king. As soon as the lands pass from the church or the crown by grant, prescription ends and a new species of title commences. Gibson's proposition about a layman's "prescribing to have a portion of tithes," would therefore have been more plainly and correctly expressed by stating, that a layman may make a title to a portion of tithe, by showing—1st, that it originally belonged to one of the dissolved religious houses; 2nd, that having come into the hands of the crown, it had been granted out again to persons from whom he derived his title.

*Yet, notwithstanding the strong current of authority in [*468] favour of the doctrine, that a layman cannot prescribe even against a lay rector,—or, to put the proposition more correctly, that as between a layman and a lay rector, mere non-payment or retainer furnishes no ground for raising a presumption of grant,—its soundness may well be questioned, and it has been frequently and ably contested; but so late as the date of Mr. Eden's edition of Lord Northington's Cases in Chancery, he states it as the result of all the authorities,^(w) "that a lay rector has every advantage, which a spiritual rector has." In other words, as the mere non-payment or retainer of tithes, without showing a grant from the crown or evidence tantamount, would be no title against an ecclesiastical rector, so it would be none against a lay rector. Mr. Eden, after adverting to the attempts which have been made to overturn this doctrine; adds, "but the courts have considered it too firmly settled to be now overthrown." Let us consider a little the grounds of this doctrine.

In *Rose v. Calland*,^(x) in a suit for specific performance, it was objected that it was not shown by the abstract, how part of the estate, alleged to be free of hay-tithe, had become exempt. The rectory, within which the lands lay, was inappropriate, and there was, it appears, though not stated, no evidence of tithe ever having been paid; and the question *was, whether on this, which was mere retainer or [*469] non-payment, the court would presume a grant against a lay impropiator. "If," said Lord Loughborough, "I should now hold it to be a flat objection to the title, that would go upon the presumption, that it is a clear point of law that a lay rector who can convey contract and diminish his right, which a spiritual rector cannot, is not to be barred from his right to any particular tithe by the length of time, or the circumstances attending the receipt of his other tithes. I should be very loth to go that length. On the other hand, I should be very unwilling to make a man purchase a law suit." On a subsequent day, adverting to the then recent decisions in the Exchequer,^(y) he said, "I rather desire to be understood as not entirely agreeing with the determination of the Court of Exchequer; but I should be in a strange situation in desiring a purchaser to take this title, because I think the point a pretty good one, though the Court of Exchequer have determined against it. It is telling him to try my

(w) *Fanshaw v. Rotherham*, 1 Eden, 302.

(y) Cited ante, 465, n. (u)

(x) 5 Ves. 186.

opinion at his expense." And the bill was accordingly dismissed on this objection, but without costs.

The doctrine, that mere non-payment is not sufficient to ground the presumption of a grant against a lay impropiator, was again acted on by the court of Exchequer in *Meade v. Norbury*, in a question not of title, [*470] but in a suit for an account.(z) From this *decision there was an appeal to the House of Lords, for the express purpose of overturning this doctrine, and Lord Redesdale, who was counsel for the vendor in *Rose v. Calland*, entered into the subject at great length, and in an argument replete with learning and justness of reasoning, contended against the doctrine; but, it became in the result unnecessary to decide the point.

That case, so far as it is material to the subject under discussion, may be thus stated: the suit was instituted by the impropriate rector of the parish of St. Nicholas, Dulwich, for an account of the tithes of, among others, certain lands called the Lower Friars. The defendant by his answer, stated, that he occupied these lands by a lease from the Marquis of Exeter and his wife Emma Vernon, the then owners of the land; that he believed these lands were part of the dissolved priory of the Augustine Friars, and were in the 34th Hen. 8, granted by letters patent to A. and B. in fee, and the same were afterwards by bargain and sale, of the 2nd Feb. in the 2nd Edw. 6, conveyed to Sir J. Packington in fee, who at that time was, as the defendant had been informed, or claimed to be, entitled to the tithes of the lands; that he believed that the lands and the tithes thereof (*in case the said Sir J. P. were entitled thereto*) by divers mesne conveyances and assurances, came into the hands of an ancestor of Emma Vernon, through whom she and her husband, the then Marquis of Exeter, claimed title; and further stating, that by such means, *or* [*471] *otherwise*, the tithes had been duly *granted, and had become legally vested in the owners of the land, and had descended upon, and become vested in the said Emma Vernon, and that by means thereof, *or otherwise*, the lands were exempt from the payment of tithes, and that no tithes, within the memory of any person living, or since the lands had been conveyed to Sir J. Packington, had been paid for the lands in question, but on the contrary they had always been deemed and reputed to be tithe-free. The title of the impropriate rector was deduced by descent from Sir J. Packington, so that the claim to the appropriation was at one time in the same family, in which the lands in question were also vested under the statute of Henry 8. These are the material facts as bearing on the subject under consideration, and the question was, whether they were sufficient to raise the presumption of a grant of the tithes to the owners of the land? The Court of Exchequer decreed for the plaintiff, notwithstanding the very strongly expressed opposition and very able argument of Baron Wood. "I freely admit," observes this learned judge, "that if the cases of the Corporation of Bury v. Evans and Nagle v. Edwards, be founded on the law of the land, I should have nothing to say; but it is those very decisions I combat, and that, because they are not founded on rational and legal principles. They hold a doctrine which would be productive of infinite mischief and injustice to

every subject of the country, by depriving them of their rights, derived by succession, after long enjoyment by their ancestors."

"The question is, whether a grant from persons capable of granting, shall not be presumed from long enjoyment? [*472] And it is on that general principle that I differ. If long usage be sufficient to raise such a presumption in all other cases, why not in the case of tithes. There I take my stand. It is a most important question for the public, and particularly so to the landholders, and therefore I shall take the liberty of entering into a review of all the cases, and expressing my decided dissent."

Having considered the cases at great length, he adds,—“now, certainly, if decisions, whether right or wrong make law, these have done so; but I contend against them, as I have a right to do, because I hold a different opinion. Judges cannot legislate, nor have their judgments the force of law, and if doubtful, they should be examined to the bottom, that it may be seen whether they are founded in justice and the law.”

From the judgment of the Court of Exchequer, there was an appeal to the House of Lords, where the view of the subject, which had been taken by Baron Wood, is followed up by Lord Redesdale, with his usual learning and force of reasoning. He thus argues the question: (a)—“The lands and the tithes were vested in the crown by different titles. The lands, when they were in the hands of the crown, might be occupied by the lessee of the crown, discharged of *tithes by the unity [*473] of possession in the crown; and if discharged of tithes by the unity of possession in the crown, and the crown make a grant of those lands, having itself the rectory, and made the grant in such terms as would convey the lands to the grantee precisely as the lessee of those lands held them, the consequence seems to me to be, that the grant of the crown would convey the tithes of those lands. The crown was capable, by its grant, of discharging these lands from the payment of tithes, that is, by conveying a right to the tithes, and consequently of discharging the lands. I cannot see why a presumption of that kind is incapable of being maintained. It seems to me to be a title capable of a legal beginning, and the ground upon which it is held, that there can be no presumption against an ecclesiastical rector, or vicar of this description, is, that there can be no legal beginning of such a title. If the respondent in this case had shown, that the king demised the lands separately, and the rectory, including the tithes of the land in question, had also been demised separately, so that there was a separate grantee of the tithes at the time of the grant of the lands by the crown, that would tend to rebut such a presumption, but there is not the slightest evidence of that description.” His Lordship then adverting to the doctrine, that though an improper rector must produce the grant of the crown, yet after such a grant is shown, it is not necessary for him to deduce his title from one person to another, proceeds thus:—“And why? because the courts are aware *that deeds of that description may be lost, and, [*474] therefore, if the grant of the crown is shown, and if a recent title, or possession according to that title, is shown, then the court will admit a presumption, that the title has been properly deduced. But why is there to be a presumption on one side, and no presumption on the

(a) 3 Bligh, O. S. 238.

other? It seems to me extraordinary, that a court of equity should hold, that there may be a presumption in favour of a rectory impropriate, but that there can be no presumption against a rectory impropriate. What difference is there between the title of a lay rector impropriate to the tithes of land, and the title of the other person who holds the lands from which the titles are claimed? They are both equally fees; both equally capable of alienation, and why there should be a presumption in favour of a lay rector, and no presumption in favour of the occupier of the lands, I must confess I cannot conceive. In both cases it must be founded upon the very probable supposition of the loss of instruments. I believe it will be found that the titles to half the estates in the kingdom would be held to be bad, if there was no presumption of the loss of instruments. In the case of rectories impropriate, very few persons would be able to deduce their titles correctly from the grant of the crown; they must deduce their titles from circumstances arising in past times. In this case it appears to me, that there is such ground of presumption; and I cannot conceive how a court of equity should imagine that upon the ground [*475] upon which a court of "equity is to deal with such a case, they could make the decree they have made."

In arguing questions of this sort involving any considerable difficulty, it is often very convenient to begin by stating, in plain and correct language, the point to be debated. In all cases of a lay impropriator claiming tithes against the owner of the land, the question is one of presumption,—not one of prescription; but, unfortunately, it was the fashion to use the latter word. Lord Northington, for example, puts it thus, "whether a layman can prescribe against a lay impropriator in *non decimando*, and by immemorial non-payment, acquire a right of exemption from non-payment of them?"(b) A more unfortunate way of stating it could not have been imagined. There can be no question of prescription in such a case; for there could have been no "immemorial non-payment by a layman, as his title must have commenced subsequently to the dissolution of monasteries. But this unlucky word being used, the argument is made to proceed thus.—A layman cannot prescribe against a spiritual rector; but the grantee of church property, which came into the hands of the crown on the dissolution of the monasteries, stands in the situation of the spiritual rector; therefore, a layman cannot prescribe against a grantee of the crown. This is the whole foundation of the doctrine, that a layman cannot prescribe against a lay rector. It is needless to ob- [*476] serve, *that the fallacy of the argument lies in the second link of the syllogism. The grantee of church property does not stand in the situation of the church; for the church cannot alien her property, which is the reason why there can be no prescription against the church,—a layman, having church property, may alien and dispose of, and deal with it in every respect as with other lay property. If therefore, a lay rector stand by for centuries, making no assertion of his claim to tithes, but suffering the owners of the land to enjoy the tithes also, or deal with the land as tithe-free, no good reason can be assigned why, the same presumption of a grant should not be raised against him, which in favour of long possession, is raised as against the occupier of every other species of lay property. The absurd maxim, that mere retainer, or non-pay-

ment of tithes raises no evidence of title in favour of long possession, has doubtless often given to the descendants of impropriate rectories, the tithes, which their ancestors had sold, in consequence of the loss of the deeds by which they had been conveyed.

It is stated by Lord Redesdale in a late case in the House of Lords, that, "according to ancient practice, in suits by lay impropriators,(c) *the production of the original grant from the crown, and a [*477] regular deduction of the title by the necessary documents was required. That practice was altered in consideration of the frequent loss of the instruments of title; but it is still necessary to produce the original grant, and to prove a possession corresponding with the title. If the impropriation has taken place since the 15th Rich. II., an endowment of the vicarage by tithes, salary, glebe, or otherwise, must be proved." And it is also said by the same learned judge, that, "it is not necessary for an impropriate rector to deduce his title from one person to another, after a grant from the crown has been shown, because the courts are aware that deeds of that description may be lost; and, therefore, if the grant of the crown is shown, and if a recent title, or possession according to that title, is, shown, then the court will admit a presumption, that the title has been properly deduced."(d)

This practice has been further qualified by *the subsequent decision in the case of *Cherry v. Legh*,(e) where it was [*478] held sufficient for the plaintiff, a lay impropriator, to show mere perception of some tithes in order to entitle him to other tithes without evidence of a grant from the Crown.

In a suit on the other hand by a spiritual rector for tithes, as he is entitled of common right, it is incumbent on the defendant to produce his title to the tithes, which must be either by grant from the crown subsequent to the dissolution of the monasteries, or by evidence tantamount. Hence, therefore, in considering the effect of a suit for tithes, it is material to distinguish whether the plaintiff claim as lay or ecclesiastical rector, for in the former case the failure of the plaintiff by no means shows of necessity that the lands are liable to pay tithes, as it may have resulted from accidental causes unconnected with the merits,—the defendant not being liable to be called on for his defence until the plaintiff has shown his title; but in the latter case, the plaintiff could only have failed because the defendant had shown a good title, and therefore, in such a case, the failure of the plaintiff implies a good title in the defendant. Thus, in *Scott v. Airey*,(f) which was a suit by the rector of Simonbourne for

(c) *Norbury v. Meade*, 3 Bligh, 224. The plaintiff in equity, in a suit for tithes, must recover by force of his title; and supposing the defence to be ever so defective, if the plaintiff does not show a title, the court has no right to make a decree in his favour, unless the title is clearly admitted by the defendant, (Per Lord Redesdale in *Norbury v. Meade*, 3 Bligh, 233.) There is no equity in the case of tithes; it is merely an incident to a right to an account. The person who claims in a court of equity a right to a decree for tithes generally speaking, claims it merely as an incident to a right to have an account of what the tithes are, in a discovery from the defendant of the tithes that have arisen from his lands, and then to an account of the tithes that have so risen; and the equitable remedy is merely an incident to a right of discovery and account, (Per Lord Redesdale, *ib.* 245.) If there is really a question of right, this is a legal question, which must be decided in a court of law.

(d) Per Lord Redesdale in *Norbury v. Meade*, 3 Bligh, O. S. 240.

(e) 1 Bligh, N. S. 306.

(f) 3 Gwill. 1174, from Lord Redesdale's MSS.

the tithes of a particular farm, which tithes were claimed by the Aireys, it was shown that these tithes had in the 5th Jac. 1, been in the possession [*479] of a family of the name of Ridley; that subsequently they were repeatedly dealt with, by way of sale, mortgage, will, &c., and ultimately passed by devise into the hands of persons under whom the Aireys made title, having always been treated as a lay and separate inheritance; the Court of Exchequer refused to decree an account or even to direct an issue, and there can be no doubt at the present day, that a decree would have been made against a purchaser of the tithes upon the same evidence of title.

Having stated thus much on the general nature of the title to tithes, it is proposed now to consider the cases in which the doctrines of presumption have been applied to it,—a subject embarrassed with peculiar difficulties arising out of the maxim *nullum tempus occurrit ecclesiæ*. “In all cases of temporal rights,” observes Lord Northington, in *Fanshaw v. Rotherham*, (g) “the courts of law consider *quieta longa et pacifica possessio* as the best evidence of title. They will therefore presume stale titles in writing barred by other conveyances probably lost, because the possession contrary to those conveyances cannot otherwise be accounted for. Possession is so strong a title, that a judge may have [*480] emphatically said he would presume an Act of Parliament(h) to support *and confirm it. Possession is a title to recover [*481] upon, and *prima facie* evidences the mere right. But *not in this *anomalous* the case of tithes, for there it evidences no right, though it should be *ultra memoriam hominis quieta et pacifica*. Where possession evidences a right, there may be reason to presume somewhat to answer a stale and latent title; but where possession

(g) 2 Eden, 296.

(h) This observation alludes to a case cited by Mr. Wilbraham, in his argument (p. 285.) The paragraph, where it occurs, is as follows: “Let us next consider the effect of the evidence which we have given in the present case. It is sufficiently clear that the tithes have never been paid by the impropiator, and that they have always been let or taken by the owner of the premises. Such a title would be clearly good as to land, where the courts have carried the doctrine of presumption to a very liberal extent. *Omnia presumantur rite esse acta*. Presumption is the evidence of things not seen; where from an apparent effect, you may infer a probable cause. We cannot produce any release or grant of the tithes in question; yet what is produced is such evidence of title as that a court ought to presume it. To suppose the contrary must be to suppose, that one family has for many ages together encroached upon and retained the property of the other, which has sat by without preferring its claim. In a bill brought for a rent, equity will not establish it, if it is not brought in a reasonable time. Length of time presumes a release, or, what is equivalent, a grant to the owner of the land; an ancient deed proves itself from presumption; a lease will be presumed from an old release. In ancient recoveries a good tenant to the præcipe has always been presumed. In Sir Francis North’s argument, in *Potter v. North*, 1 Vent. 187, it is said, ancient grants happen to be lost many times, and it would be hard that no title could be made to things that lie in grant but by showing of a grant; therefore, upon usage, time does not run, and the law presumes a grant and a lawful beginning, and allows such usage for a good title. And another case was cited of *Lord Stafford v. Llewellyn*, Skin. 77, where lands were conveyed to trustees upon trust, amongst other things, to settle on Lord Stafford for life with power of leasing. Lord Stafford made several leases, but it not appearing that the trustees had made the settlement, the question was, whether the leases were good, and there having been a long possession under them, the court said they would presume that my Lord had some conveyance from the trustees to enable him to make the leases; and here one Farrer’s case was cited which was in C. B., where Farrer made a title from the Black Prince, which could not be out of him but by an Act of Parliament; but yet, for that the possession had gone otherwise ever since, the court presumed that there had been such an act, though net to be found.”

does not evidence a right, there seem to be no grounds for such a presumption; because that would be to presume *a title*." Whether the doctrine laid down in the preceding passage be or be not founded in sound law must, from what has been already stated, appear to be somewhat doubtful; but at all events between a mere non-payment and retainer of tithe by the owner or occupier of the land, and the actual pernancy and receipt of the tithes, separate from, and independent of, any interest in, or connection with the land, there is a clear and well-settled distinction. "The former," to adopt the language of Sir J. Leach,⁽ⁱ⁾ "may, and always does exist, though the title be only to a prescription in *non decimando*; the latter cannot, except where there is a legal title to the tithes, of which, therefore, it is the characteristic criterion."

Hence, adverse enjoyment, or pernancy of the tithes for a long series of years, where it may have had a legal origin, coupled with successive conveyances, by which the tithe has been transferred from [*482] one person *to another, and corresponding with the enjoyment, is sufficient to justify a jury in presuming a grant of them;^(k) and in principle the cases are the same, whether the tithe itself be received, or only a payment in lieu of tithe, though the latter is not perhaps quite so strong in point of evidence.^(l) Under circumstances like these, it is as competent to presume a grant against a spiritual rector, as a lay improPRIATOR,—to raise such a presumption it is only necessary to show long possession, fortified by acts of ownership, and that the title may have had a legal commencement. Thus, in *Oxenden v. Skinner*,^(m) which was an action by a purchaser to recover his deposit on a bidding for the manor of Elham, and lands at Elham, in Kent, 549 acres of which were represented to be tithe-free. Whether the lands were tithe-free or not? was the question, as to which the facts were these. In 1080, Bishop Odo held Elham in his demesne, and upon his disgrace his lands were given to a follower of the conqueror, who had not only the manor but a portion of tithes separate and distinct from the rectory. His son gave this portion by the description of "my tithes of the town of Elham," to the monks of St. Andrew, of Rochester, who had a confirmation of the tithes from Hen. 1; the portion of tithes remained in the priory of Rochester until 1540. Hen. 8 granted them in the 33rd year [*483] of his *reign to the Dean and Chapter of Rochester, but they never had possession of them, nor had any tithes ever been paid of the lands in question, except a *modus* of twenty shillings to the vicar. The manor of Elham escheated to the Crown in 41 Ed. 3, and was granted by Rich. 2 to feoffees in trust for St. Stephen's Chapel, at Westminster, where it remained till the dissolution of colleges and chantries in 1 Ed. 6, who in the 5th year of his reign granted it with all its rights and appurtenances to Lord Clinton. It was re-conveyed to the Crown next year, and then leased to Sir Edward Wootton for eighty years. Shortly before the expiration of that term, James 1 conveyed the reversion in fee, with all rights and appurtenances to Sir Charles Herbert, from whom the vendor derived title; but there was no express grant of tithes in any of the conveyances. It was insisted in support of the title, that a conveyance from the Dean and Chapter of Rochester previous to the 13

(i) *Heathcote v. Aldridge*, 1 Madd. 244.

(l) *Ibid*.

(k) *Bacon v. Williams*, 3 Russ. 529.

(m) 3 Gwill. 1613.

Eliz. would be presumed, and that the general words were sufficient to convey the tithes as profits of the lands. Lord Kenyon held that such a presumption ought to be made. "Here is possession of them for 250 years; who can disturb the title? the rector cannot. These tithes have been severed from the rectory ever since the conquest. If these tithes had been part of the rectorial tithes, no time would have barred the rector. Where is there any other right? The Dean and Chapter of Rochester might before the 13 Eliz. have alienated them. I am very clear that on a possession of two centuries *and a half, I must tell the jury that they should presume any conveyance from the Dean and Chapter." On a suggestion from counsel that there were no words of conveyance of tithes, his Lordship added,—“I think the tithes pass. The vendor will now convey as you please, and in what form of words you please. I think I should exercise my discretion in a court of equity in the same way I do my judgment here, where I am bound by strict law, and I must tell the jury that there is a good title. Such length of possession is a *positive prescription*, as they say in the civil law, and the church of Rochester never had the tithes as of common right. I must tell the jury that this is a good title, and that the plaintiff cannot recover.”

In *Lady Dartmouth v. Roberts*,⁽ⁿ⁾ which was an action of debt under the 2 & 3 Ed. 6, c. 13, for not setting out certain tithe hay, at the trial before Thomson, B., at York, the plaintiffs made title to the tithes in question under the Marquis of Halifax, to whom the same had been conveyed, in 1676, and they produced copies of a bill and answer in a certain cause after mentioned, and also gave parol evidence of the receipt of the tithes, or payments in lieu thereof, as far back as living memory could trace. The defendant gave counter evidence of title, the tendency of which was to show, that the right to the tithes was in the vicar, under [*485] an endowment of the vicarage with the tithes of hay of the whole *parish in 1253 by Walter Gray, Archbishop of York, in the 37th year of his pontificate, and that the same appeared to have remained annexed to the vicarage after the dissolution of the monastery of St. Oswald de Rostell, by an ecclesiastical survey, in the 26 Hen. 8 (1535,) and by ministers' accounts in the 33 & 34 Hen. 8. But there was no evidence of the vicar having ever, in fact, taken the tithe of hay or any composition for it. It was insisted, that as this evidence related to a period before the restraining statutes, and as there was no evidence that since those statutes the tithes of hay had belonged to, or been enjoyed by the vicar, it was open to the jury to presume that before the restraining statute, the vicar, with the consent of the ordinary and patron, had conveyed away the tithes for valuable consideration, to some other monastery, the property of which afterwards on its dissolution went to the Crown, from which it passed into the hands of the grantee of the rectory; and the jury accordingly found for the plaintiff. On a motion for a new trial, Lord Ellenborough, in giving his opinion thus argues the question of presumption:—"On the question as to the sufficiency of evidence of title, I am inclined to think that in 1253, the tithe of hay was in the vicar, under the endowment of the Archbishop of York, with the consent of the prior and his convent. But assuming that under the endow-

(n) 10 East, 334.

ment, the vicar was once well entitled to the tithe of hay, co-extensive with the limits of the parish, he might before the restraining statutes have granted it to another *ecclesiastical person, with the consent of patron and ordinary. There would then have been a [*486] portion of tithes dissevered from the vicarage, and there was evidence that it was dissevered from the conveyance of the title in 1676 to Lord Halifax, which after their disseverance, but prior to the restraining statutes might have got into lay hands. We therefore want to pray in aid only this supposition as to these portions of tithe, which appear to have been enjoyed dissevered from the vicarage, that they were so dissevered; and in favour of modern enjoyment, which is the best interpreter of right where documentary evidence does not exist, we will in conformity with Lord Kenyon, who said that he would presume two hundred deeds if necessary, presume here that a disseverance took place. The actual perception of tithe hay, either in kind or by composition, never appeared to be in the vicar from the time of the first endowment, but a perception of 1s. 4d. annually, for a considerable time, under a general composition with the rector, which though not so strong as if the rector had taken it in kind, will virtually include it, nothing appearing to the contrary. Therefore there was not only evidence to be left in the balance to the jury, but that evidence preponderates. Le Blanc, J., said, "that when the uniform course of enjoyment has been with a party, the court will presume every thing necessary for the support of it; if there be any way by which the tithe might have been conveyed away out of the vicar, so as to have got into the plaintiff's hands, the *court will presume that this was the way in fa- [*487] vour of the enjoyment." (o)

A similar question underwent great discussion in the recent case of *Huskinson v. Monk*, (p) where it arose on exceptions to the title, in a suit for the specific performance of a contract for the sale of certain freehold and copyhold lands in the parish and manor of Barking, in Essex. The freeholds and part of the copyholds were alleged in the agreement to be exempt from the tithes of corn and hay. The ground of exemption was the unity of possession of the manor, rectory, and lands in the abbess and convent of Barking, which was one of the greater monasteries, and was dissolved by the 31st Henry 8. There was some question whether the lands were, or were not part of the possessions of the monastery, but nothing appears ultimately to have turned upon this. The lands, alleged to be exempt, were proved not to have paid tithes within living memory. On the reference to the master to inquire into the title, he reported that the copyholds in question were exempt. To this the purchaser excepted. With respect to the freehold lands, there was no question; it being clear, that the union of the rectory with the title to the freehold lands before time of memory, would, when the abbey, as in this case, was dissolved by the 31st Henry 8, continue the discharge of tithes to the crown. But, as the contract included besides the copyholds alleged *to be tithe-free, [*488] other copyholds held of the manor of Barking, which were not tithe-free, the difficulty arose, how it could be made out in point of law, that upon the head of union some copyholds could be tithe-free,

and others subject to tithe? To explain this difficulty, it was suggested for the plaintiff, that the copyholds which did not pay tithe, were the demesne lands of the abbess, and in her occupation, and for that reason might not pay tithe, although all the other copyholds did; but upon that *prima facie*, this difficulty arose, that if these lands not titheable were the demesne lands of the abbey, and in the occupation of the abbess, then as no copyholds could be created within time of memory, and as the dissolution of the abbey was within the time of memory, these lands could not now be legal copyholds. To support this suggestion, the Archbishop of Canterbury's case,^(g) and Crouch v. Frier,^(r) were cited, but on being examined they afforded no aid to this view of the case. "There being, therefore, no authority," said Sir J. Leach, "which is expressly in point, the case remains to be considered upon principle alone, and it has occurred to me that there might be a way in which it is possible, that there may have been a legal origin to the exemption claimed for the particular copyhold, although the other copyholds pay tithes. The union between the manor and the rectory to be good, must [*489] have taken place before time of memory; *but yet before the union the abbess might have granted out all the copyholds, except what she then retained as demesne lands; and the copyholders thus created, would, of course, pay tithes to the rector before the union. But the demesne lands might not then pay tithes to the rector, because the abbess being a spiritual person, was herself capable of tithes. After the union, the abbess might still, before time of memory, have alienated these thirteen acres, then part of her demesnes, by copy of Court Roll, free from tithe as she held them; and in such case these thirteen acres would at this day continue legally discharged of tithe, although the other copyholds paid tithes. There being this mode by which the exemption claimed might have had a legal origin, I think myself bound to affirm the title as to these tithes."

The same principle was followed up in the recent case of *Humphreys v. Wagstaff*.^(s) In this case the bill was filed by the improper rector of the parish of Westham, for the payment of the tithes of certain lands within that parish, in his occupation and reversion, known by the name of Abbey Farm. The plaintiff claimed under a grant from the Crown in 1820. The defence was, that the Abbey of Stratford Langthorne, which was one of the greater Abbeys, and of the Cistercian order, was founded in the reign of Henry 2; "that the abbots and monks of the [*490] monastery were, at the time of the surrender *and dissolution of the monastery, rectors of the rectory of Westham, and had been, time out of mind, seised in fee of the rectory, and also of the land; that the land in question had been during all the time aforesaid, and was at the time of the surrender and dissolution, part of the lands and possessions of the monastery, and was then part of their demesne lands; and being so part and parcel of the monastery, was by bull or prescription, or some other lawful ways or means, wholly exempt from tithe or the payment thereof, and had been, time out of mind, held and enjoyed by the abbot and monks of the monastery, for themselves, their farmers and tenants, freed and discharged from tithes or the pay-

(g) 2 Rep. 48.

(r) Cro. Eliz. 784.

(s) 1 Russ. & M. 529.

ment thereof." Shortly after the foundation a vicarage was endowed, and disputes having afterwards arisen between the monks and the vicar, the rights of the vicar were ascertained by judges delegate, acting under the authority of the Pope, and it was declared "that he should receive the oblations and obventions to the aforesaid church belonging, other than the tithes of corn and pulse," which were to be paid to the monks. By a deed of composition real, made in 1516, between the monks and the vicar, the vicar conceded to them from thenceforth "the right of receiving all the tithes, predial and personal, great, small, and mixed, in consideration of a yearly stipend." The plaintiffs also produced a lease in the 30 Hen. 8, whereby the monks demised to one Shaw, for a term of fifty years, a messuage and lands in the parish, together with the tithes of corn, grass, and hay, and "all other tithes to the rectory belonging, "from and in all the meadows, [*491] marshes, and pastures in Westham, being on the south part of the way called the Portway, in the parish of Westham, in as ample manner and form as John Shipman lately had and received the same to farm, except all lands, meadows, marshes, and pastures, which the said abbot and convent now occupy for their household husbandry and cattle." There was also evidence that various other lands in the parish belonging to the abbey had paid tithes. On the part of the defendant it was proved, that although tithes had been regularly paid for all other lands in the parish, no tithes had been paid for the lands in question; and it was further proved, that a grant of lands which had been part of the possessions of the abbey, was made in the 30 of Henry 8, to one Newton, in tail, and that James 1 afterwards granted the reversion of the same lands. There was in the names and descriptions of the lands so granted, some similarity to the names and descriptions by which the abbey farm had been conveyed to the present owners; but there was no proof that the identical lands constituting that farm had been part of the demesnes of the abbey, and comprised in the original endowment. Sir J. Leach held the lands to be discharged:—"The defence here is not upon the ground of the union of the rectory and lands in the hands of the abbey, but upon the ground of a discharge by prescription. It must be taken that these lands have never paid tithes since the dissolution, and every presumption is to be made in *favour of an enjoyment of [*492] nearly 300 years. If, consistently with the evidence in the cause, it is possible that the discharge from tithes could have had a legal origin, the court is bound to confirm it. The plaintiffs principally rely upon the deed of real composition in 1516, as conclusive evidence that the lands could not before that deed have been discharged from tithes. Now that deed is a grant from the vicar of all tithes then belonging to the parish church; but if the lands were part of the original possessions of the abbey, in the time of Hen. 2, and were then discharged of tithes in the hands of the abbey, the deed of 1516 does not affect the question, because these tithes did not then belong to the church. I am of opinion that it is to be inferred that the lands were part of the possessions of the abbey, in the time of Hen. 2, and that they were discharged of tithes before memory, because such facts are consistent with the evidence in the cause, and would give legal origin to the continued enjoyment since the dissolution of the abbey. The bill must therefore be dismissed, and with costs."

MAY, 1838—U

II. *As to the title to a portion(t) of tithes, as a separate inheritance.* The right to tithes *in pertainancy or to a portion of [*493] tithes is analagous to a right to a mere lay inheritance in lands, and the modern title to them must be deduced in the same manner. The title, as has been already stated, must have commenced in a grant from the Crown; but in the absence of a grant, or of direct evidence that there has been one, acts of ownership for a long period will be sufficient ground on which to presume a grant. These considerations apply not only to tithes but to a payment in lieu of tithe, whether that be called a *modus*, composition-real, pension, or rate-tithe.

Thus in *Williams v. Bacon*,(u) which was a suit at the instance of the rector of Markfield, against the occupiers of certain lands in the parish, and against C. M. Phillips, for an account and payment of the tithes on those lands, the occupiers in their answer stated that the Lordship of Markfield consisted partly of ancient enclosed lands, called and known by the name of the Cliff Slade, and that the occupiers of it had paid the defendant Phillips a yearly sum, which he had accepted in lieu of the tithes of those lands. Phillips, by his answer, claimed the tithes in kind, or a *modus*, composition, rate-tithe, or annual payment of 4s. 10d. in lieu thereof, and said that the said portion of tithes, *modus*, &c. had been for a great length of time the subject of conveyances and assurances as a lay fee, and that the persons from whom he derived title had, [*494] *for 140 years and upwards, received the tithes of the lands in question, or accepted the payment mentioned in lieu and satisfaction thereof. At the hearing an issue was directed, whether Phillips was entitled to the tithes or the *modus* mentioned, in respect of these lands? At the trial of the issue, Phillips produced his title-deeds for the last 150 years, by some of which was conveyed "all that rate-tithe of 4s. yearly, renewing, increasing, and arising out of certain grounds in Markfield, called the Cliff Slade;" in others, "the tithes or rate-tithes of 4s. 8d., &c.;" in others, "the tithes or rate-tithes of 4s. 10d., &c." It was also proved that as far as living memory could reach, this payment had been received by Phillips and his ancestors, and that no tithes had been paid to the rector for the lands in question. The jury, under the direction of the court, found a verdict for Phillips. On a motion for a new trial the point was, whether, in the absence of any evidence of a commencement of the title, it could be presumed against a spiritual rector. Sir J. Leach held clearly that such presumption ought to be made. "The defendant," said his Honour, "here claims a portion of tithe to which he may be legally entitled; and the single consideration is, whether there was sufficient evidence before the jury to justify their presumption that he had such legal title? It is proved by existing deeds that this portion of tithes has been the regular subject of conveyance for one hundred and fifty years past; and that the actual

(t) *A portion of tithes means a profit of tithes which a man hath within the parish of another parson or vicar, and its origin must have been in times when it was lawful for every one to distribute and pay as he chose, his tithes or any portion thereof, to any church according to his best devotion; and there was no restraint to church or parish in certain: so by continuance that grew to a right and title." (Dean & Chapter of Bristol v. Clarke, Dyer 84 b; Gibson's Codex, 662.)

(u) 1 Sim. and Stn. 416.

perception of tithes, or of a money payment *in lieu of tithes, has accompanied the title by conveyance as far back [*495] as living testimony can reach; and unless it be peculiar to this species of property, that the origin of the title must be actually shown, no evidence can be more conclusive. It is argued that this would be good evidence against a lay rector, according to the case of *Scott v. Airey*,^(v) and the other cases referred to;^(w) but that is not sufficient evidence against the plaintiff, who is a spiritual rector. I cannot very well reach the principle of this distinction. A legal title to a portion of tithes may exist as well against a spiritual rector as against a lay impropiator, and why, therefore, is not such a title to be presumed from long conveyance and possession? It is true that a lay impropiator may himself sever a portion of tithes, which a spiritual rector^(x) cannot do; and that a presumption may therefore be raised against a lay impropiator upon slighter evidence than would be reasonable against a spiritual rector. But this does not affect the principle. If it were necessary in the case of a spiritual rector to show the actual origin of a portion of tithes, it is not probable that any such portion could at this day be maintained."

In cases of rectorial tithes, as well as in all other *cases [*496] where the title is originally derived from the crown, according to the practice of conveyancers, a purchaser is entitled to see the original grant, in order to be satisfied that there is no reservation of rent, nor any remainder or reversion in the Crown, because if there be any, as they are not barrable by fine or recovery, they must still be considered to be outstanding; but as this is the only purpose for which the original grant can be needed, the purchaser cannot insist upon the intermediate deduction of the title, although such a requisition is sometimes made in ignorance.^(y) It does not seem, however, that the vendor is bound to do more than show the purchaser where he may see the grant.^(z) According to the decisions which have been stated above, this practice must be modified, it being clearly established by them, that when the title may have had a legal origin, that is to say, when it is shown that the tithes in question were part of the property of the dissolved monasteries, a grant from the Crown will be presumed on acts of ownership of sufficient duration.

III. *As to presuming the surrender of outstanding terms, and the re-conveyance of legal estates in fee.*—The courts of law have varied a good deal at different times in their temper as to presuming the surrender of terms. During the period when Lord Mansfield and Mr. Justice Buller swayed the decisions in the Court of King's Bench, they got to this *length, that a legal term outstanding in a trustee, should [*497] never be set up against the *cestui que trust*; and in one case,^(a) it was even held that where a legal term was created for a particular purpose, if that purpose were satisfied, or if it were even unsatis-

(v) *Gwill*. 1174.

(w) *Strutt v. Baker*, 2 Ves. jun. 625; *Fanehaw v. Rotheram*, 1 Eden, 276; *Borney v. Harvey*, 17 Ves. 119; and *Meade v. Norbury*, 2 Price, 338, and 3 Bligh, O. S.

(x) As to the origin of the title to a portion of tithes as against a spiritual rector, see *Gib. Cod.* 663.

(y) *Hayes's Concise Conv.* p. 5, n. (6) & (7).

(z) *Ibid.*

(a) *Doe d. Bristow v. Pegge*, 1 T. R. 795, n.

fied but not affected by the claims of the litigating parties, it should not be set up between them in an ejectment, but should be considered as if it had never been created.

At the present day it is only surprising how doctrines so utterly at variance with the principles of common law and the whole current of sound authority, could ever have been listened to. The law, however, was brought back to its true principle by the decision of Lord Kenyon in *Doe v. Staple*,^(b) in which case, notwithstanding the strong opposition of Mr. Justice Buller, he over-ruled the equitable decisions of Lord Mansfield. It was an action of ejectment; there were three demises laid at successive periods of time, and constituting the three counts of the declaration. It was clear that there must be a verdict for the plaintiff, and the only question was, under which of these counts it should be taken? Which turned upon these facts:—There was a term of 99 years created for securing annuities to several persons, and determinable on the death of the survivor; the surviving annuitant was living at the date of the second demise, but died before the time at which the third was laid. It

[*498] was insisted for the plaintiff that judgment should *be taken on the second count, notwithstanding the term was then subsisting unsatisfied, “for it had been repeatedly settled, that a lessor of a plaintiff should not be turned round by a lease paramount to his title if he did not mean to disturb the tenancy, and that a reversionary interest, *subject to a right of present possession in another*, was recoverable in ejectment. That it was expressly found by the special verdict that the lessor of the plaintiff claimed *subject to the remaining annuity*, and consequently did not mean to disturb it: the term of 99 years, which was created for that purpose only, could not therefore be set up by a third person, who derived title from the same proprietor as the lessor of the plaintiff,” and *Doe d. Bristow v. Pegge*^(c) was referred to as a decisive authority in support of these propositions, the court having there unanimously held that the outstanding terms which were clearly unsatisfied, and which the plaintiff submitted not to disturb, could not be set up as a bar to the ejectment by the defendant, whose own title appeared to be subject to the same incumbrances. Lord Kenyon, however, put a stop to this course of decision, and after observing that “he extremely approved of what was said by Lord Mansfield in *Lade v. Holford*,^(d) that he would not suffer a plaintiff in ejectment to be non-suited by a term outstanding in his own trustee, or a satisfied term set up by a mortgagor against his mortgagee, but would direct a jury to presume a

[*499] “surrender,” proceeds thus: “but here the facts of the case preclude any such presumption; there was an existing term at the several times of the two first demises, and a considerable benefit was to be derived out of it; the last annuitant did not die till after the time of the second demise, therefore there was no reason to presume that the trustees had surrendered, and they would have been personally liable if they had; that in this case it was impossible to suppose that there was a surrender of the term, or that it was satisfied because the verdict found the contrary fact;” he was therefore of opinion that judgment must be given only on the last count in the declaration, on the demise laid after

(b) 2 T. R. 684.

(c) 1 T. R. 175, n.

(d) 3 Burr. 1416.

the death of the last annuitant, when the term had expired. Mr. Justice Buller premised a very elaborate argument in opposition, by observing "that it was a question of the most serious importance to the public in general, whether that should still be considered as law, which had undoubtedly been received as such for thirty years past?" but the other judges concurred with the Chief Justice, and thus the scheme of equitable ejectments which Lord Mansfield and his *protegé* Judge Buller had so long laboured to establish was put an end to.

After this decision nothing more was heard of presuming the surrender of unsatisfied or attendant terms for a long period. The extraordinary decision in *Doe v. Hilder*(*e*) once more recalled the attention *of lawyers to this subject; in that case a term created [*500] in 1762, and which had been expressly assigned to attend the inheritance in 1779, was presumed to be surrendered in 1819, merely because in certain intermediate family transactions no notice had been taken of it; and against the facts and merits of the case as they appeared on a second ejectment, to recover back the estate from the party who had recovered in the first ejectment.(*f*) It is needless farther to advert to this decision, as it was immediately condemned by all the great property lawyers of the day, and as its authority has in fact been formally repudiated by the Court of King's Bench in the late case of *Doe v. Plowman*.(*g*) Such being a brief view of the changes, which this doctrine has undergone during the last century, we come now to consider in what cases, as between vendor and purchaser, a term may be presumed to have been surrendered; and the results fairly deducible from the authorities seem to be these:—

1st. That under no circumstances whatever, can an unsatisfied term be presumed to be surrendered.

2nd. Under no circumstances whatever, can a satisfied term, which has been once assigned to attend the inheritance, be presumed to be surrendered as between vendor and purchaser.

3rd. Whether a term, which has been satisfied, but never assigned to attend, ought or ought not *to be presumed to be surrendered? is a question of circumstances, with respect to which [*501] perhaps, it may be considered to be established, that where there is ground for a clear presumption, that the trusts of the term have been satisfied; and during the period which has since elapsed, the estate has been dealt with on sale or mortgage, as if there were no term, it seems that a surrender must be presumed.

In *Emery v. Growcock*,(*h*) the Master on the reference as to title, reported that a good title, could be made, if a term created for raising portions for daughters by a settlement on the 12th March, 1711, was assigned to a trustee for the purchaser. The question was, Whether a surrender of the term could be presumed? The settlement provided for the *cesser* of the term in the event of the trusts never arising, but not in the event of their arising and being satisfied. There were several daughters and no evidence that the portions had been satisfied. A settlement of the estate was made in 1744, and a recovery suffered, and Lord

(*e*) 2 Barn. & Ald. 782.

(*f*) *Doe v. Putland*, stated in Sir Ed. Sugden's *V. & P.* 440; and see *Bartlett v. Downes*, 3 Barn. & Cress. 616.

(*g*) 2 Barn. & Adolph. 573.

(*h*) 6 Madd. 54.

Gower, the then tenant for life of the estate, one of the settlors, covenanted that the estate was free from incumbrances; no assignment or disposition appeared to have been made at any time of the term. It appeared also, that the portions were not to be raised till Lord Gower's death, which took place in 1774. There was no evidence that the portions were paid, but the *parties entitled had attained their [*502] age, for a period of about sixty years, and were all dead, and the family had long dealt with the estate as if there were no term and no portions due. Sir J. Leach, V. C., after laying down the doctrine on the subject, as it is stated in a preceding page,⁽ⁱ⁾ proceeded thus:—"There is here, first, a clear presumption that the purpose for which the term was created is satisfied; next, there is presumption that the necessary term was surrendered, because it is not subsequently noticed in the transactions of the family; and lastly, there is the absence of all evidence, that this term was ever applied to any new purpose. In this case, I should consider it my duty to give a clear direction to the jury, that they were bound to find the term surrendered; and I must therefore hold, that there is no sufficient doubt to entitle the purchaser to be relieved from his contract."

In a case of *ex parte Holman*,^(k) which came before the same judge a few months after, the same principles were acted on. It appeared on the abstract, that by an Indenture, bearing date the 24th December, 1735, a mortgage term of five hundred years was created; and that the mortgage-money was not repaid on the day named, but the same with all interest was paid to the executor of the termor on the 6th October, 1750, as appeared by a receipt indorsed on the Indenture. There had been no [*503] *assignment or surrender of the term, and therefore the purchaser insisted, that the vendors should at their own expense discover the personal representatives of the termor, and procure an assignment from them to a trustee to attend the inheritance. The Master to whom the title had been referred, reported that the term was then vested in the personal representative or representatives of the termor, but it did not appear by any evidence before him who was, or were such personal representative or representatives. And the Master was of opinion that the term ought to be assigned to a trustee for the purchaser, and that the vendors ought to bear the expense of deducing the title thereto, and procuring it to be so assigned. In an intermediate deed of 1749, the term was noticed, but was not mentioned in any other deed; and there were three conveyances upon sales, one in 1734, another in 1791, and the third in 1792. The Vice Chancellor was of opinion that a surrender of the term must be presumed.

In considering the state of circumstances under which an outstanding legal estate in fee may be presumed to have been re-conveyed, certain considerations are admissible which could not be received into the argument where the question was, Whether an outstanding term could be presumed to have been surrendered? When the purposes for which a term [*504] has been created are satisfied, it becomes *immediately attendant on the inheritance, and subsequent incumbrancers getting

(i) See ante p. 415:

(k) Stated in Sir Edward Sugden's *Vend. & Purch.*, p. 447, 8th edit.

possession of it may avail themselves of it, for their own protection against purchasers or other incumbrancers who had previously advanced their money. Hence, the moment its original purpose has been satisfied, it assumes a new series of functions by virtue of which a purchaser who has actually completed his contract, may yet be deprived of the benefit of his purchase by an incumbrancer without notice getting in this term. Here, therefore, we perceive an obvious source of danger in presuming the surrender of a term, which, in point of fact, may be still in existence.

Out of this consideration grows the great distinction between presuming the surrender of a term and the reconveyance of the legal estate in fee. There is no time at which it can be said of the former that its purposes have been fulfilled, and that it would be useless in the hands of third persons: of the latter, as soon as the purpose for which the conveyance was originally made has been completed, it becomes *functus officio*. Hence, therefore, when the period can be ascertained at which the original object of the conveyance was effected as the legal fee ought at that period to have been reconveyed, and can afterwards be of no use to any person but the owner of the inheritance, there is no reason why after a proper lapse of time a reconveyance should not be presumed.

*In *England v. Slade*,^(l) the plaintiff in an ejectment, brought in 1792, offered in evidence in support of his title [*505] a lease from A, and it was proved that A claimed under a will, dated in 1777, by which the estate in question was devised to the use of trustees in trust for A, and to convey the same to him immediately on his attaining twenty-one, and in the meantime for his maintenance. A came of age in September, 1788: no conveyance by the trustees to A was proved, and therefore it was objected that the legal estate being in trustees the lease ought to have been granted by them: and the question was, Whether a conveyance from the trustees could be presumed? And Lord Kenyon, the other judges assenting, held that a conveyance ought to be presumed. "There is no reason," said his Lordship, "why the jury should not have presumed a conveyance from the trustees to him upon his attaining the age of twenty-one in pursuance of their trust, according to what was said by Lord Mansfield in *Lade v. Holford*.^(m) It was what they were bound to do; and what a court of equity would have compelled them to have done had they refused. But it is rather to be presumed that they did do their duty; and as to the time the jury may be directed to presume a surrender or conveyance in much less time than twenty years." In the subsequent case of *Doe v. Sybourn*,⁽ⁿ⁾ a similar presumption, *or rather the same presumption was made, for the question arose on the same title, and the case [*506] is cited here principally with a view to calling the attention to the marginal abstract, in which the effect of the case on this point is entirely misstated.^(o) Lord Kenyon, meaning apparently to state more precisely the doctrine acted on by him in *England v. Slade*, laid it down, "that

(l) 4 T. R. 682.

(m) Bull. N. P. 110.

(n) 2 T. R. 2.

(o) "The jury may presume an old satisfied term surrendered to the *cestui que use*, in order to substantiate a lease executed by him." This is mere nonsense; there was no such question in the case, the point being exactly the same as that in *England v. Slade*.

in all cases where trustees ought to convey to the beneficial owner, he would leave it to the jury to presume, when such a presumption might reasonably be made, that they had conveyed accordingly, in order to prevent a good title from being defeated by matter of form: and he thought the rule, *as far as it went*, highly convenient and proper."

The cases which have been just considered amount to nothing more than this, that where there is a plain trust, and a time appointed when the legal fee ought to have been re-conveyed, then, in support of the title of the party beneficially interested, the court will presume that the reconveyance was actually made at the time when it ought to have been made: a proposition which subsequent decisions have carried to this extent,—that where the legal fee has been conveyed upon trusts, and it [*507] can be ascertained at what time these *trusts have been satisfied or became unnecessary, then a re-conveyance may be presumed at the lapse of twenty years, or at a shorter period, even as against a purchaser; for as the grounds on which the presumption is made are that the purposes of the conveyance were satisfied or had become unnecessary at a period which can be ascertained, and that it was then the duty of the trustees to have re-conveyed, and that it must be assumed they did their duty, it seems to be perfectly immaterial whether the period which may have elapsed be a century or twenty years, or any shorter interval.

The leading authority as to presuming the re-conveyance of legal estates in fee, where no time is fixed for such re-conveyance, is *Hillary v. Waller*, (p) which was a suit for the specific performance of an agreement by the defendant to purchase a farm and lands, called Fingreth Hall Farm. By indentures of lease and release of the 22d and 23rd Feb. 1664, the manor of Fingreth and Fingreth Hall Farm were conveyed to Henry Mildmay, his heirs and assigns, Upon trust, subject to the payment of two annuities to Sir Humphrey Mildmay, and Lady Jane Catherine, his wife, "as a collateral security to Gurdon and Knightsbridge, and their heirs and assigns, for the title of the manor of St. Clere's and Heron's, and the lands and premises intended to be thereby conveyed to Gurdon [*508] and Knightsbridge, and their heirs and assigns; and further and *until Gurdon and Knightsbridge, their heirs, &c. should be ejected from the said manor of St. Clere's and Heron's, by reason of any then existing legal title, Upon trust to permit Mary Mildmay to receive the rents of the said premises during her life, and after her death, to permit her husband, John Mildmay, to receive them; and after his decease in trust for such persons as they should appoint. And upon further trust, in case Gurdon and Knightsbridge should not be evicted "before the expiration of eleven years next after the deaths of Sir Humphrey Mildmay and John Mildmay, or in case there should be such eviction if Henry Mildmay, his heirs, &c. should not be evicted out of the lands so granted, &c., then Henry Mildmay, his heirs, &c. should convey one moiety of Fingreth Hall and Manor, to such person as John and Mary Mildmay should appoint." It would appear from the recitals that Henry Mildmay, the grantee of the lands conveyed by way of collateral security for the title to the manor of St. Clere's and Heron's, was

the actual purchaser of this manor, Gurdon and Knightsbridge being only trustees for him.

By indentures, dated in 1694, being a marriage settlement, and also a fine covenanted to be levied, the said manor and farm at Fingreth were re-settled, and it was covenanted that the said manor and premises were free from incumbrances, except a lease or rent-charge since expired, or except a conveyance of the whole premises to Henry Mildmay and his heirs, as a collateral security to *indemnify him from any [*509] incumbrance upon the manor and premises of St. Clere's and Heron's.

Since 1794 the possession had gone according to the rights of the parties pursuant to the settlement, there having been no disturbance of the St. Clere's estate, and it was admitted that there could be no re-conveyance, and that unless it could be now presumed to be re-conveyed, it must for ever remain outstanding. On the behalf of the purchaser it was insisted that the legal estate must now be considered as outstanding upon the trusts of the indentures of 1664. And the main question was, Whether a re-conveyance could be presumed? The case seems to have been argued upon the assumption that if the period of the completion of the trusts could be ascertained, a re-conveyance at this period might be presumed: but the form of the conveyance threw considerable difficulty in the way of this. It will be noticed that in the event of eviction within eleven years, after the deaths of Sir H. and J. Mildmay, one moiety is directed to be re-conveyed; but nothing is said as to the other moiety. The consequence of which was, that though it was sufficiently obvious that as to one moiety the trust would expire within eleven years after the death of Sir Humphrey and John Mildmay, yet as to the other no period could be fixed upon, when it could be considered that the trust was satisfied. Sir W. Grant argued the question thus: "If we could in this case ascertain at what period the legal estate ought to have been re-conveyed, I see no reason why the presumption of its being re-conveyed. [*510] *at that period should not be made. The difficulty here is that by the deed of 1664 it is only as to a moiety of the estate that any time is limited for the re-conveyance. It could not however be meant that the legal estate in any part should continue outstanding for ever. The conveyance of it was made for a purpose that must have some limit. It was by way of security against the eviction of the St. Clere's estate. At what precise moment the danger of eviction ceased it is impossible to say. But if the time that has elapsed without claim, 140 years does not furnish the inference that none can be made, I do not know what period would be sufficient for that purpose. Mere possibilities ought not to be regarded. The court, to adopt the language of Lord Hardwicke in *Lyddall v. Weston*,(q) must govern itself by a moral certainty, for it is impossible in the nature of things there should be a mathematical certainty of a good title. There are often suggestions of old entails, and often doubts what issue persons have left, whether more or fewer, and yet these were never allowed to be objections of that force as to overturn a title to an estate. So we have here suggestions of possible grounds of claim. But no man can believe that the owners of the St. Clere's estate feel any apprehension of eviction by title existing prior to 1664; or, that

they would at any time during the last sixty years have had the least objection to direct a re-conveyance *of the Fingreth Hall estate; if the persons in whom the legal interest is vested could have been discovered. Why then should not such re-conveyance be presumed? As to particular circumstances, from which it is contended that an actual re-conveyance may be inferred, there are none of very conclusive effect: yet, perhaps they ought not to be left wholly unnoticed." And after examining these circumstances, his Honour concludes thus:—"The evidence of actual re-conveyance, must, however, be admitted to be slight and inconclusive. But, on the general grounds, I have before stated, I conceive that there is no court before which a question concerning this title can come, that would not under all the circumstances of the case presume, or direct a jury to presume, that the legal estate has been re-conveyed. It is therefore such a title as a purchaser may safely take, and the defendant ought consequently specifically to perform his agreement."

From this decree there was an appeal; the case was again fully argued, and Lord Erskine in a judgment, on which he seems to have bestowed great care, affirmed Sir W. Grant's decision. The difficulty of the Master of the Rolls, as to the exact point of time when there ought to have been a re-conveyance, was a good deal cleared up at the hearing on appeal. It was very clearly stated in argument,^(r) and that statement was adopted [*512] by his Lordship, that the trusts of the deed were of two *kinds,—one to secure the two annuities, the other to indemnify Gurdon and Knightsbridge. It is plain upon the deed, that the parties considered that the incumbrances or charges upon the St. Clere estate must appear in a short time, and that all that was necessary, was to give security for eleven years after the death of Sir Humphrey and John Mildmay; and accordingly at this period without eviction they directed a reconveyance of one moiety,—not directing a re-conveyance of the whole, under a notion, probably, that the annuities might not then be expired, but that at all events the remaining moiety would be sufficient to secure their payment. And it was probably with reference to this last object only, which depending upon lives must be of uncertain duration, that they did not fix the period for re-conveying the other moiety,—omitting, most probably by accident, to insert a declaration, that this moiety should be re-conveyed upon the death of the annuitants. Looking at the transaction in this way, which appears to be the most probable explanation of it, as Lady Jane Catherine appears to have survived Sir Humphrey and John, the period, when the re-conveyance ought to have been made, was at her death, or at least within a few years after. This being so, Had sufficient time lapsed, since then, to authorise the court to make the presumption of a re-conveyance? Lord Erskine, after laying down the general principles on which presumptive evidence is founded, [*513] proceeds thus:—"Here then is the application of these principles. *I presume a conveyance from the trustee of the estate, intended as an indemnity against incumbrances, when for a century and more every idea of an incumbrance has been at an end; and if these presumptions are made after 20 or 30 years, because the party being out of possession all presumption is against him, I make it in this instance.

It would be very different if the intention had not appeared upon the deed. But when the time is designated, namely, eleven years, if I cannot do this at the end of 140 years, it is admitted this objection must continue to any period. By supporting this objection I should lay down a rule most dangerous, and be destroying the very reason of legal presumption. There is a defect and omission in the deed; not providing, that when the annuities are satisfied there shall be a conveyance of the other moiety. My judgment is, that at this distance of time I ought to presume that this re-conveyance has been made. I agree I must make that presumption. My judgment is founded upon this, and I make the presumption without sending it to law, being confident a judge must tell a jury they ought to presume and they would presume that this re-conveyance had been made. Therefore I am of opinion that this decree ought to be affirmed. I give my judgment laying down the general principle of law, and saying this case comes within it. Nothing follows as to other cases."

There seems no reason why Lord Erskine should have so carefully limited the operation of his decision to the circumstances of this particular case. The *decision, notwithstanding the frequent observations to be found reflecting on its soundness, seems to be not [*514] only right with regard to the particular circumstances, but to be founded also upon principles of great general application and convenience.

In *Cooke v. Soltau*,^(s) a mortgage in fee of the premises was made in 1745, and there was no further mention made in the abstract of this mortgage, or of any re-conveyance, or conveyance of the premises for the mortgagee, his heirs and assigns. In 1791, there was a mortgage for a term, in which was contained a covenant for the peaceable possession of the premises free from incumbrances, and the other usual covenants for title. In the year 1816, the plaintiff raised a sum of money by the grant of an annuity, for the purpose of paying off what was due on the mortgage; and the term was assigned to a trustee for better securing the annuity and subject thereto in trust for the plaintiff, and to attend the inheritance. In 1818, the plaintiff took a conveyance of the legal estate from the representative of the surviving trustee. It appeared, also, by the affidavits, that no payment, or demand, either of principal or interest, in respect of the mortgage of 1745, had ever been made upon the plaintiff or his father who took the estate under the will of the original mortgagor. The plaintiff's solicitor had searched at Doctor's Commons for the will or letters of administration of the mortgagee of 1745, and had also *endeavoured to find out his heir, but without success. In an old abstract, made in 1791, upon the treaty of [*515] the loan then negotiated, there was a memorandum, that the principal and interest due on the mortgage of 1745, had been paid upwards of forty years ago, and the conveyancer's opinion before whom the abstract was then laid, that a mortgagee would not run any risk in accepting the title. There were one or two other circumstances in the case, but they do not appear to be material, and the question was, Whether the heir or devisee of the mortgagee of 1745, or other the person in whom his estate might be vested, was a necessary party to a conveyance to a purchaser? Or, Whether the circumstances afforded sufficient ground for presuming that

(s) 1 Sim. and Stu. 154.

the mortgage debt had been satisfied, and the legal estate re-conveyed? and Sir J. Leach held that they did afford sufficient ground for such presumption: "I adhere," said his Honour, "to the principle of *Emery v. Growcock*. No re-conveyance could ever be presumed without the actual production of the deed, unless it could be presumed in this case."

The last case on this subject is *Noel v. Bewley*; (1) there a mortgage term was in 1711 granted to A; in 1712 a mortgage in fee was made to S, but it was by another deed, executed shortly after, declared that the money secured by the mortgage so made to him was the money of A, [*516] and that his name was *only made use of in trust for A, and he covenanted that his heirs and assigns would, at the request of A, his executors administrators and assigns, do all such acts as should be required for further assigning the trust created as aforesaid. By an indenture made in 1714 reciting that A had agreed with the mortgagor for the purchase of the equity of redemption, A assigned the residue of the aforesaid term to a trustee in trust for himself, his heirs and assigns, and to attend the inheritance, and S covenanted that he his heirs and assigns would stand seised of the premises conveyed and assigned to him in trust for A his heirs and assigns. By indentures of lease and release, bearing date immediately after the last-mentioned deed, but to which S was not a party, the mortgagor conveyed the premises to A, his heirs and assigns, and covenanted that they were free from all incumbrances, except the aforesaid term. Nothing more appeared concerning the legal estate vested in S, and one question was, Whether under these circumstances, and the leases mentioned in the judgment, a re-conveyance ought to be presumed?

Sir L. Shadwell decided in the affirmative. "It appears," said his Honour, "by the recital in the lease of 1817 that there had been a lease previously made by the person who was the owner of the estate prior to the conveyance to A, and that some doubt had arisen in the mind of the lessee whether the lease was a good one; and then it is recited that A being the owner of the reversion and inheritance expect- [*517] ant on the determination of the *lease had agreed to confirm it, and accordingly he uses general terms of confirmation and grant for the purpose of setting up that prior lease for ninety-nine years. That was a clear act of dominion, and of such a nature as that it could not answer the object of the lessee unless it passed the legal estate, and therefore it seems to me to afford a strong reason for presuming that the legal estate was not outstanding. Then there were subsequent leases granted, not merely from year to year, but for long periods of time; and it is fair to infer that those leases were intended to comprise that which upon the face of them they appear to pass. And if any thing is to be deduced from the terms used in the deed of 1802, it appears to me that the deed does of itself afford a strong inference that the legal estate was not outstanding; because it commences with a recital, that F A by his will, which was duly executed, gave and devised unto and to the use of M A, &c. The intention of the grantor to convey the contingent remainder is next recited, and that remainder is then conveyed unto and to the use of the trustee, his heirs and assigns. The parties therefore acted on the supposition that F A had the legal estate,

(1) 3 Sim. 108.

he having devised it to uses, and that the legal estate in the contingent remainder was capable of being limited to the use of a trustee. It appears to me therefore that there is sufficient in this case to authorize me to presume that the legal estate was not outstanding."

**(2) Title unmarketable on account of uncertainty in Matter of Law.* [*518]

"In law, strictly speaking, there is no doubt; but practically there is often a doubt as to the application of settled principles." This observation, which occurs in a passage of Sir John Leach's judgment, in *Emery v. Growcock*, already cited, ^(u) appears to be not entirely correct. The cases are innumerable in which the state of the law is uncertain. If the question depend, for instance, on the construction of certain words in an Act of Parliament, which, from some ambiguity in the expression, admit of being variously construed, the state of the law on that question must remain uncertain, till it has been ascertained by the decision of a court of competent jurisdiction. The same observation of course applies to wills or deeds, when, from some departure from the correct and well defined forms of technical expression, it becomes necessary to ascertain the legal import of particular words, or clauses. The learned judge, whose observation stands at the head of this section, would probably say, that the uncertainty of the law in cases of this kind arises from "a doubt as to the application of settled principles." Perhaps it would be more correct to say, that the uncertainty arises from there being no settled principles, or none at least applicable *to the construction of the words, on which the doubt is raised. [*519]

It would be easy to adduce other cases of a more simple and direct character; for instance, it is no where decided whether a grant or other droiturel conveyance of an estate in fee, by husband seised in right of his wife, of his wife's estate, be *void* or *voidable* only; ^(v) and as good reasons can perhaps be adduced for one proposition as for the other. So, where a reversion is vested in the crown by forfeiture, it is a doubtful question whether it is or is not barred by a common recovery, and on this ground the House of Lords in *Blosse v. Clanmorris*, ^(w) refused to enforce specific performance.

So in devises to trustees, it is frequently uncertain whether they retain the legal estate, or are merely devisees to uses,—whether the words of the devise pass the fee, or only a particular estate commensurate with the duties and obligations of the trust,—whether the language of the will does, or does not, comprise estates vested in the testator as trustee or mortgagee, or whether they descend to his heir-at-law,—where any link in the chain of title consists of a conveyance, containing words both of transfer and appointment, whether it shall operate as a conveyance to uses, so that the uses may be executed into an estate, or as an appointment, so that all the ulterior uses are mere trusts. ^(x) So *in sales under the authority of instruments imperfectly [*520]

^(u) Ante, p. 415.

^(v) 1 Prest. Abstr. 334.

^(w) 3 Bligh, 62.

^(x) *Cox v. Chamberlain*, 4 Ves. 631, decided by Lord Rosalyn, and *Roach v. Wadham*, 6 East, 289, by the court of King's Bench, the only decisions on the subject, being at variance, and the latter never having been cordially acquiesced in by conveyancers.

drawn, as happens very frequently with wills, whether the power in question authorise a sale? and if so, whether the parties enabled to sell, are capable of giving the purchaser a good receipt for his money?—two questions which will be examined in detail in a subsequent page.

Objections to title on the ground of uncertainty in the law, must of necessity be as numerous and diversified in their character, as are the cases in which the law is doubtful or uncertain; completely to enumerate, to classify, or to arrange the cases on this head, would perhaps be impossible, or if possible, could only be effected by a detailed investigation of every branch of the law of real property, affording questionable and undetermined points. All that can here be reasonably attempted is the illustration of this head by bringing together a few leading cases, in which the courts have refused to interfere, on the ground of its not being quite clear what would be the construction of the law, on the questions raised.

The most extensive source of objection to title, on the mere uncertainty of the law, is to be found probably in cases arising on the construction of wills; and more particularly in that very numerous class of cases, involving the question whether on the true construction of the [*521] words of the will, the devisee *takes an estate for life, or in tail, or in fee subject to be defeated by an executory devise, &c. &c. If the devisee be tenant in tail, he can make a good title by recovery,—or if he be tenant in tail with reversion in fee, by a fine,^(y)—if tenant for life, remainder to children not yet *in esse*, remainder to himself in fee, he can make a good title by the destruction of the contingent remainders, where there are no trustees to preserve contingent remainders, &c. &c. If, however, it be doubtful whether, on the true construction of the will, the devisee takes such an estate as enables him by the usual means to make a good conveyance of the fee, the court will not compel a purchaser, even though that doubt be a very slender one, to accept the title.

In the old case of *Heath v. Heath*,^(z) the testator, gave to his son A, all his estate, until B, the plaintiff, should attain his age of 22 years and no longer. He after says—“*Item* I give and bequeath unto B, all my messuages in H and C for ever, that is, if he have a son or sons who shall attain 21; but if my kinsman, B, should chance to die without son or sons to inherit, my will is, that the son of my son A shall inherit.” The question was, what estate B took by virtue of this devise? The Master certified that he the plaintiff took an estate tail, to which an exception was taken on behalf of the purchaser, that he took only an estate for life. Lord Thurlow, after *considering the various [*522] constructions of which the will was susceptible, and of which the last,—apparently the one he most approved,—was, that the estate was given to the plaintiff for ever; but if he should die without issue, or the issue should not attain 21, then over, proceeded thus:—“If this is the true construction, it is a fee to B, subject to an executory devise, which he at present cannot by any conveyance defeat. For a court of equity, to compel a party to take an estate which it cannot war-

(y) As to this see ante p. 309.

(z) 1 Bro. C. C. 147.

rant(a) to him, would be an extraordinary proceeding; the party, therefore, cannot make a title, and the exception must be allowed."

So in *Sharp v. Adcock*,(b) the title of the vendor, the plaintiff, depended on the will of her late husband Thomas Sharp, which *inter alia* was in the following words,—“I give and bequeath to my dear wife, the whole of my remaining property in the Bank of England or otherwise, and also a freehold house which I now live in, situate in Silver street, in, &c.; also a freehold estate in Regent Street, in &c.; also about sixty-one acres of freehold land, with houses and barns thereon, situate in the *Fens, in the parish of &c.; also a leasehold estate purchased of the as- [*523] signees of Mr. B., and which is in the parish of &c., *with all right and title to the same*.” The land which was the subject of the contract, was part of the sixty-one acres of freehold land, situate in the fens, and it was contended on behalf of the vendor, that the fee passed to the vendor, by force of the words “with all right and title to the same,” which followed the description of the leasehold estate. The court, however, thought the point too doubtful, Lord Gifford, M. R., saying,—“to compel the purchaser to take this title would be to compel him to buy a suit; for the application of the words, which are relied upon as giving the fee, to all previous devises made to the wife, is much too doubtful ever to be settled without litigation. I must therefore allow the purchaser’s exception.”

In *Willcox v. Bellaers*,(c) a testator devised to the plaintiff (among others) the estate in question, “during his life, and after his decease to such of his children, and in such shares and proportions as the plaintiff should by his last will appoint, and to their heirs, and for want of such appointment, and as to those parts of the premises of which no appointment should be made, to the heirs of his body and their heirs for ever. In case he should die without issue, then immediately from and after his decease, the testator devised the estate to his the testator’s daughter, *Elizabeth Willcox, during her life, remainder to such [*524] of her children as she should appoint, and in default of appointment, to the heirs of her body and their heirs and assigns for ever.” And after giving certain legacies, the testator devised all the residue of his estate, after payments of debts, legacies, and funeral expenses, to the plaintiff, who, before he had issue, suffered a recovery to the use of himself in fee, and afterwards contracted to sell the premises to the defendant, and the question was, whether, under the will and recovery, the plaintiff could give a good conveyance of the fee? It was contended in support of the title either that the plaintiff was tenant in tail under the will, and then he acquired the fee by the recovery, or that he was tenant for life, with contingent remainder in fee over, and then that by the recovery he destroyed the contingent remainders, and took the fee under the residuary

(a) This expression, which is frequently used in the older cases, is incorrect; the court never warrants a title. In *Toulmin v. Steere*, (3 Mer. 223,) Sir W. Grant states, that the estate having been purchased under the direction of the Court of Chancery “is a circumstance that cannot affect or prejudice the rights and interests of third persons. The Court of Chancery employs its officer to investigate the titles of estates, but does not warrant them.”

(b) 4 Russ. 374.

(c) Turn. & Russ. 494.

clause. *Doe v. Jesson*, (d) was chiefly relied on in support of the former position; *Smith v. Death* (e) in support of the latter. The Master of the Rolls, (f) after observing that the case of *Doe v. Jesson*, ought to be a lesson to the court on the necessity of caution, the King's Bench and the House of Lords having come to opposite conclusions, with respect to the effect of certain words in creating an estate tail, stated "that he could [*525] not but consider that there was a very nice *and doubtful question on the construction, of the will, on which the title of the plaintiff rested, and therefore without either allowing or overruling the exceptions, and without expressing any opinion on the title" dismissed the bill.

Admitting it to be doubtful upon a fair construction of the will, whether the plaintiff took an estate tail, of which by the way, according to the ordinary rules of construction, it would be difficult to raise any question, it seems very clear that here a good title was made by the destruction of the contingent remainder; this view of the case does not, however, appear to have been very much pressed in the argument, and is not noticed at all by the court.

The inference to be drawn from this case is, that whenever a reasonable doubt can be raised upon the construction of a will, whether a party through whom the vendor makes title, was tenant in tail, or only tenant for life, tenant in fee subject to an executory devise, &c., which embraces almost every case except where there has been a decision of a court of law upon the precise words, a purchaser cannot be advised to accept the title, as being clearly marketable.

Price v. Strange (g) will afford an illustration of another class of cases; there a testator devised his real estate to trustees in trust to pay the rents to his wife during her life, if she should so long continue his widow, and [*526] after her death or marriage, to *sell the same, and in case his youngest child being a son, had then attained the age of twenty-three, or being a daughter had attained the same age, or married with such consent as there mentioned, to pay the produce of such sale amongst such of his children as should then be living "and the legal representative or representatives of him, her, or them, as should be then dead, share and share alike." One of the sons became bankrupt, and his share in the produce of the real estates, expectant upon the death or second marriage of his mother, who was still living and a widow, was put up to sale by his assignees, and purchased by the defendant. The bill was for a specific performance of this contract, and the defendant objected to the title, upon the ground that the children did not take a vested interest during the life of their mother, and that if a child died during the life of the mother, its share in the real estate went to persons designated as substitutes by the term "legal representatives," or, at all events, there was so much doubt in the question, that a purchaser ought not to be compelled to take the title. The single question was, whether the words "legal representatives" was a term of substitution, or of limitation expressing the quantity of interest intended for the legatee. If the latter were the true con-

(d) 5 Maule & Selw. 95, reversed Dom. Proc. 2 Bligh, 1, where the doctrines of the court on questions of this kind, are very fully considered.

(e) 5 Madd. 397.

(f) Lord Gifford.

(g) 6 Madd. 159; see *Saberton v. Skeels*, 1 Russ. & M. 587, where the cases on this subject are collected.

struction on the whole of the will, then as the ordinary acceptation of "legal representatives," is executors or administrators, the words used in the will would be equivalent to a direction to pay the produce of the estate at the death or marriage *of the widow, to the children, their executors or administrators, or in other words, [*527] would give them vested interests, and the vendor's title would be good. His Honour, after a very careful examination, although of opinion that the words in question were words of limitation, refused to enforce the contract, concluding thus:—"The strong inclination of my opinion, therefore is, that the plaintiffs, the assignees of the bankrupt, can make a good title to his share. But having regard to the proposition, that a purchaser is not bound to take a doubtful title, without undertaking to determine precisely the limit and extent of that rule, I am of opinion that the case is within the sense of that proposition a doubtful title.

"In attempting to lay down a rule upon this subject, I should say that a purchaser is not to take a property which he can only acquire in possession by litigation and judicial decision; and

"That the trustees here could never be advised after the case of *Bridge v. Abbott*,^(h) to divide the property in question, without the direction of a court; and to compel the purchaser, therefore, to take this title, would be to compel him to buy a law suit."

Where there is any reasonable ground for supposing that the vendor holds, subject to an undisclosed trust, a purchaser will not be compelled to complete. Thus in *Sheffield v. Lord Mulgrave*⁽ⁱ⁾ Sir Charles Sheffield, being seised in fee simple of estates in the *counties of [*528] Lincoln and York, and of a rectory for lives, under a lease granted by the Archbishop of York, devised to trustees in fee all his manors, messuages, lands, tenements, tithes, and hereditaments, and all his real estate whatsoever, lying and being in the several counties of Lincoln and York, and elsewhere, in the kingdom of Great Britain," upon trusts in strict settlement. He then gave to his daughter Maria Sophia, and his son Robert, annuities of £100 a-year a-piece, and charged the rectory with the payment of them; "and he directed that if his son Robert and his daughter Maria Sophia, or either of them, should be living at his decease, the lease of the rectory should be renewed, and that the fine and expenses of renewal should be paid out of his personal estate; and that the lives of his said son and daughter, if both living at the time of granting such new lease, or in case of the decease of either, the life of the survivor should be added to the life or lives then subsisting, by which the said premises should be held; but that if both should be then living his son Robert should have the preference, so far as to have his life first added in the new lease." After the death of the testator, Sir J. Sheffield, the eldest son and heir-at-law, having obtained a renewal for the lives of himself and two other persons, and releases of the two annuities, contracted with Lord Mulgrave for the sale to him of the rectory. In a suit for the performance of the agreement a case was, at the hearing, directed to the Court of King's Bench, on the [*529] *question, "What interest the vendor took in the leasehold

(h) 3 Bro. C. C. 224.

(i) 2 Ves. jun. 526.

for lives?" when they certified(*k*) that the leasehold property was not comprehended in the hereditaments and real estate devised in strict settlement, but that it descended upon Sir J. Sheffield, as special occupant, and that, as such, he took the absolute interest at law in the then existing lease.(*l*) The defendant still resisted performance, insisting that the cautious expression of the certificate, "that Sir J. Sheffield took the absolute interest *at law*," plainly indicated the opinion of the judges, that it was very doubtful whether in a court of equity he was a special occupant for his own benefit. It was also argued that it was very doubtful whether the former part of the certificate was right; and Lord Eldon, who seems to have concurred in both these views, refused to decree specific performance. "The particular expression of the certificate," said his Lordship, "was intended as a caution to me, and suggests a trust behind for parties not before the court. But I feel a just bias on my mind upon the question the court of law has decided. When I sent it to law, I thought it a very doubtful question. I cannot force a purchaser to take a title upon which I entertain great doubt. I cannot indemnify. Titles [*530] are frequently overturned at the "distance of many years; I should not like to have such a title forced upon me."

In *Shaw v. Wright*(*m*) the court refused an application for the sale of certain leasehold estates taken under a sequestration for want of an answer, on the ground that the sequestrators could not make a title; reasoning the point thus:—"But how shall I make a title? By whom? I cannot well order the sequestrators to sell without at the same time warranting the title. Then I do not know how I can do that: it does not transfer the term to the sequestrators. It is only a process to compel an appearance,—the performance of a duty. The difficulty is this: if the sequestrators sell, and the purchasers should be brought before this court to complete their contracts, I could not compel them to pay the money. I cannot make a man take a title which he is to support by a bill for an injunction."

It is submitted therefore to be sufficiently clear, that in a great variety of questions the law is unsettled. There are however, many cases, where both the principles of law, and the state of facts are clear, and yet the title may be unmarketable, because "there may be doubt as to the application of these principles." Thus in *Cooper v. Denne*,(*n*) one of the earliest cases on doubtful titles, the subject of sale was a leasehold estate, [*531] and the objection to the title was, that A, the "tenant for life, under an act of Parliament, empowering him to grant leases, had not in granting the leases, conformed to the terms prescribed by the act. As to this there was no doubt, and the only question was, whether the leases had been confirmed; as to which the facts were, that A, the tenant for life, had joined with B, the remainderman in tail, in suffering a recovery, the uses of which were declared to be to A for life, remainder to trustees for a term, remainder in fee to B, who sold his reversion by auction; and the leases were recited in the deed upon the recovery, and in the particular and conveyance under the sale. The ques-

(*k*) *Sheffield v. Lord Mulgrave*, 5 T. R. 571.

(*l*) The leading authorities on this subject are *Thompson v. Lawley*, 5 Ves. 476, 540; *Watkins v. Lea*, 6 Ves. 633; *Woodhouse v. Meredith*, 1 Mer. 450.

(*m*) 3 Ves. 22.

(*n*) 1 Ves. jun. 565; S. C. 4 Bro. C. C. 80.

tion was, whether this amounted to a confirmation, upon which Lord Commissioner Ashurst expressed the opinion of the court as follows: "When the court is called upon to decree a specific performance, it must be upon the ground, that there is no sufficient reason for refusing it. The fair way is, for those who are to decide it in equity, to put themselves in the place of the party. If I was called upon to give my opinion upon the point of confirmation, I should rather say, I thought this in point of law a confirmation; as I think the leases were specifically mentioned, and treated as existing and valid leases, and that may be considered as a confirmation of the lease; and a case that was cited from Moore, does contain that doctrine. But the court is not called upon to decide that. It is sufficient for them to decide it if they think it a doubtful matter." Here then was a case in which the *facts [*532] and the principles of the law were sufficiently clear, yet the court felt so much doubt upon the application of the law to the facts, that they would not enforce the contract without the lease being confirmed by the reversioner.

Where a title is derived through a purchase made by a party, who at the time sustained a fiduciary character in respect to the vendor, this will be a fatal objection to the title, on the ground that such a transaction is liable to be set aside by the persons whose interests were compromised by it. Hence where it appears that the title is derived through a purchase by a solicitor from his client,—by a trustee from his *cestui que trust*,—by a guardian from his ward,—by an assignee in bankruptcy, or otherwise, for the benefit of creditors, from the debtor, or by any other person standing in a situation of trust, from a person entitled to the care and protection imposed by that trust,—if such transaction be at all of modern date, a purchaser can rarely be advised to complete in the absence of the most conclusive evidence of the fairness of the transaction. Perhaps it is not going too far to state, that in every case of this kind he is entitled to call for some evidence or guarantee of the concurrence of the *cestui que trust*, or party entitled to overhaul the transaction.

To show the vigilance with which courts require purchases of this kind to be guarded, *ex parte Bage(o)* may be referred to. There the assignees *had twice offered up the bankrupt's estate for sale, in lots, but no adequate bidding was made: they afterwards sold all but one lot, for which only £350 was offered. [*533] One of the assignees was desirous of becoming the purchaser at £380. On a petition by the assignees, that he might be allowed to do so, Sir Thomas Plumer refused, saying, "I will make no such order, unless the consent of the creditors, at a meeting called for that purpose, has been first obtained, and then let the assignee present a petition by himself; and let it be served upon the other assignees and the bankrupt."

On the same principle, where a vendor makes title through a party, who purchased, under circumstances which threw a doubt upon the fairness of the transaction, and raised a question whether the purchase-money had been actually paid, a purchaser from him will not be com-

pelled to complete in the absence of evidence clearing up all difficulties in respect to this transaction. Thus, in the recent case of *Boswell v. Mendham*,^(p) the vendor being tenant for life of an estate, remainder to his wife for life, remainder to his eldest son in tail, on the eldest son attaining twenty-one, the entail was cut off, and subject to an annuity to the eldest son for life, the estate was limited to such uses as vendor and his wife should appoint, and in default of appointment to the vendor for life, remainder to his wife for life, remainder to the vendor in fee. The

[*534] deeds treated the transaction *as a purchase from the son by the father, in consideration of the said annuity, and of a debt stated to be due from the son to the father. The purchaser objected to the title, insisting that the vendor was bound to produce evidence that the debt was due, and of the fairness of the transaction. The Master to whom the title was referred thought otherwise. To his report the purchaser excepted, and the exception was allowed. In *Grover v. Hugell*,^(q) the force of such an objection was carried much farther; for it was held sufficient to entitle the purchaser, after damages had been recovered at law, to have the contract, on a bill filed for that purpose, delivered up to be cancelled. This case arose on a contract for the sale of lands, which had formerly been part of the glebe lands of a rectory which had been sold for the redemption of the land-tax. It appeared upon the abstract delivered to the purchaser, that the curate, who was the apparent purchaser, and to whom the conveyance was made in 1804, had, in the month of June following, conveyed the lands to the rector for the identical sum at which he purchased. This exciting suspicion led to inquiries, which raised a reasonable presumption, that the rector had originally been the actual purchaser. On the discovery of this fact, the plaintiff refused to complete, whereupon an action was brought against him, on which he suffered judgment by default, and the damages

[*535] were assessed upon a writ of *inquiry. He then filed a bill to restrain proceedings at law, and to have the contract cancelled, for repayment of his deposit and for payment of his costs at law and in equity. It was argued by the very able counsel for the vendor, first—that even if the rector were in reality the original purchaser, that the sale being by commissioners appointed by the Crown, two of whom must have been parties to the conveyance,^(r) the case was analogous to the case of trustees having a power of sale with the approbation of the tenant for life, selling to the tenant for life himself, which it has been held is unimpeachable,^(s) and that consequently the fact of the rector in this case being the purchaser, was no objection; and second, if the objection was valid the plaintiff might have had the full benefit of it in the action at law. Lord Gifford, M. R., is reported to have expressed himself in answer to these considerations as follows:—"I am of opinion that the equitable objection here could not have been taken advantage of at law; and that at law the conveyance by the commissioners would have been held to confer a good title, and would have maintained the action. The general rule in equity is, that a man cannot place himself in a situation in which his interest conflicts with his duty. The duty of the rector was to obtain the best possible price for the land sold; and his interest as

(p) 6 Madd. 373.

(r) 42 Geo. 3, c. 116.

(q) 3 Russ. 428.

(s) *Howard v. Ducane*, 1 Turn. 8.

purchaser was to pay the least possible price for it. *It is no answer to say that the superintendence of the commis- [*536] sioners would secure a full price. The sale is to be by public auction, and before two of the commissioners, or some person appointed by them; and their approbation of the sale is required by the act. But still the duty of the rector was to give his aid to the procuring of the best possible price. The case of *Howard v. Ducane*, where it was held that trustees for sale with the approbation of the tenant for life, may sell to the tenant for life, does not furnish a general principle, but is an exception to the general principle. Lord Eldon expressly put the case upon the practice of conveyancers, which he did not think it safe to unsettle, and states that he should have said originally it would not do."

This decision cannot perhaps be entirely approved. That the rector having been substantially the purchaser, was a good objection, and would have been a sufficient answer to a bill for specific performance seems to be quite clear; but it is a very different proposition which affirms that it afforded a sufficient ground for depriving the vendors of their remedy at law, and for delivering up the contract to be cancelled. If the objection in question could have been used at the trial at law, and no good reason, nor indeed is any reason at all given by the Master of the Rolls, why it might not have been so used, then it seems perfectly plain that the purchaser having negligently suffered judgment by default without availing himself of his *defence, was, upon any ordinary principle, [*537] either of law or equity, too late to come into a court of chancery, and deprive the vendor of the fruit of his judgment.

With respect to the delivering up the contract, the purchaser seems to have had just as little claim to such relief; and the true nature of the question appears to have been overlooked as well by the vendor's counsel as by the judge. By the former it was said, "This is a bill to have a contract rescinded and delivered up, which according to the case alleged by the plaintiff is void at law. A court of equity does not exercise so useless a jurisdiction as to pronounce a decree, directing an instrument which is in itself a nullity to be delivered up or cancelled." What the bill actually stated does not appear, but it could hardly have treated as a nullity an agreement upon which the vendor had recovered a judgment. With respect, however, to this argument the Master of the Rolls said, "It is not necessary to decide whether a bill in equity will or will not lie to have a contract for purchase delivered up where a good title cannot be made, because here the bill has other objects; the injunction to stay execution at law, and the repayment of the deposit. It is fit to observe, however, that the general principle of a court of equity is, that a bill in equity may be filed for the delivering up of an instrument which cannot be enforced at law, in order that the plaintiff may not be harassed by vexatious proceedings at law." It may be fit to observe [*538] *upon this *dictum*, that equity does not order an agreement to be delivered up to be cancelled, unless it be founded in fraud, or be void under the terms of an act of Parliament.(t)

Titles depending upon a re-grant from the Crown, of lands which had

(t) See 2 Swanst. 157, n. as to the jurisdiction of equity in the delivering up void instruments.

escheated for want of heirs, or been forfeited^(u) on a conviction of felony are frequently involved in considerable difficulty. Where lands are likely to be forfeited on an anticipated conviction for felony, it is not unusual for the party so situated, in conjunction with his friends, to attempt before trial by conveyances upon trust and other expedients to avoid the forfeiture; but as the forfeiture on conviction relates back to the date of the offence, all such contrivances are manifestly useless. As, however, the Crpwn is slow to interfere in such matters, and never, except upon information, these expedients often attain the immediate object of the parties, no claim being then made by the Crown. The title is nevertheless defective, and, therefore, whenever a purchaser has any reason to suspect that there has been an occurrence of this sort, he is entitled to [*539] have the matter fairly put right by a re-grant of the lands to be obtained *on a memorial to the Lords of the Treasury. The purchaser is also entitled to be satisfied, that where a grant has been obtained from the Crown or escheated or forfeited lands, that the re-grant was founded on a true representation of the facts, and that it had not acted under mis-information or mistake, it being in the latter case competent for the Crown to recall its grant, notwithstanding any derivative title depending on it.^(v)

With respect to titles depending on voluntary settlements, it is now established, that a voluntary settlor entering into a contract for the sale of an estate cannot enforce it in equity;^(w) one reason why the court will not assist him being that he has no equity to defeat the act which he has done himself; another consideration which has weighed in such cases being, that if the purchaser were compelled to take an estate at the instance of such a man, the court could not be quite sure that there were no intermediate acts, which might have made a settlement, originally voluntary, no longer so.^(x) A purchaser with notice of a voluntary settlement, may safely complete, provided the settlement *be voluntary*, but if it should happen that the settlement was not in its inception voluntary, or had ceased to be so by some subsequent bargain, the purchaser's [*540] title would of course to that extent be void. A purchaser, *therefore, can never be advised to accept such a title.

But though the court will not enforce such a contract for sale at the instance of a voluntary settlor, it will do so at the instance of a purchaser with notice of the settlement,^(y) if he be desirous of having it specifically performed; and this, notwithstanding the pendency of a suit by the parties entitled under the settlement to have the trusts carried into effect.^(z)

As a contract for sale will not be enforced at the suit of a voluntary settlor, so neither it seems will it be enforced at the suit of his creditors

(u) For a collection of the authorities to the effect of a conviction for felony, see *Roberts v. Walker*, 1 Russ. and M. 752.

(v) *Cumming v. Forrester*, 2 Jac. and Walk. 334.

(w) *Smith v. Garland*, 2 Mer. 123.

(x) *Johnson v. Legard*, 1 Turn. and Russ. 394.

(y) *Buckle v. Mitchell*, 18 Ves. 101; *Metcalfe v. Pulvertoft*, 1 Ves. and Bea. 180.

(z) *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Metcalfe v. Pulvertoft*, 1 Ves. and Bea. 180; 8. C. 2 Ves. and Bea. 200.

insisting that the contract had converted into personal assets the estate contracted to be sold. (a)

Titles are frequently defective in respect of payments for charitable purposes charged on lands. Whenever the abstract discloses such charges, a purchaser is entitled to be off his bargain if the estate was not sold subject to them. The extent to which the purchaser is liable in respect of them is very distinctly laid down in the following cases.

In *Peacock v. Thewer*, (b) it was held that if *lands* be given to a charitable use, and a purchaser buy *these lands, not having notice of the charitable use, it shall not bind the purchaser; but if a [*541] *rent* be given *out of lands* to a charitable use, and a purchaser have not notice of the charitable use, yet he shall pay the rent, for that he doth not purchase it, but the land out of which the rent issueth; but he shall not pay any more arrearages of the rent than what was incurred during his time of purchase, but every occupier and owner must answer the arrearages for his own time.

In *Bernard Hide's case*, (c) A grants by deed a rent seck out of 208 acres of land, for relief of the poor in certain parishes, and limits this to commence after her death, and gives seisin of this in her life; the rent is behind for 36 years; Hide purchaseth the land, having notice of the charitable use, and it was found that Hide had held the land for seven years. It was resolved among other things,

1st, That Hide should pay all the arrears for 36 years, for that the land is chargeable with the rent in whose hands soever it cometh.

2nd, If land or rent be given to a charitable use and misemployed, a purchaser, who hath notice of the gift shall not be further charged than during his own time; but where the rent is concealed, a purchaser shall answer for all the time of the concealment, for the land is a debtor and *transit cum onere*.

3d, If a rent be granted out of land to a charitable use, and one buys the land for a valuable consideration *of money, having no notice of the charitable use and rent, yet the rent remains, [*542] because it is collateral to the land, and another thing; and the notice required by the statute is to be given as well of the land as of the charitable use.

And lastly it was resolved in the case of *Sutton v. Colefield*, (d) that if land given to a charitable use be sold for money to one that hath notice of the use, this notice did make the land charitable [*qu. chargeable*] with the use in all other purchasers' hands; although the other purchasers had no notice of the use, because they take the land charged with other incumbrances, as the first purchaser held; but if the first purchaser had no notice of the use, then is the land discharged of the use, and it shall so remain in all the purchasers' hands, although they had notice of the use.

With regard to this last resolution it is clear, that the fact of the first purchaser not having had notice, can never be proved, and consequently a title depending on such a discharge can never be forced on a purchaser.

(a) *Johnson v. Legard*, 1 Turn. and Russ. 295; as to the rights of creditors under such settlements, see *Garrard v. Lord Lauderdale*, 3 Sim. 1; *Walwyn v. Coutts*, ib. 14.

(b) *Duke's Ch. Uses*, Chap. 6, ca. 33.

(c) *Duke's Ch. Uses*, Chap. 6, ca. 15.

(d) *Duke's Ch. Uses*, Ch. 6, ca. 6.

The Statute of Limitations does not apply to charities, which are not barred by length of time. Practice and enjoyment, however, for a long period of time, are a very material consideration, when the question is, as to the effect and true construction of the instrument containing the trust for the charity.^(e) And under a proper state of circumstances the courts [*543] "in support of a title fortified by long possession, would undoubtedly presume that the charge was by some means or other extinguished.

Titles to leasehold property, involving questions as to the effect of provisions declaring the lease void, and for re-entry in certain specified events, are frequently objected to on the ground of its being doubtful, Whether on the true construction of the proviso the lease is void or only voidable, on the occurrence of the given contingency? If void, there is, of course, no title; if voidable only, and there have been acts of confirmation, the title is good; if it be doubtful, whether the covenants be voidable or not, the title is unmarketable notwithstanding such acts. Thus, in *Dakin v. Cope*,^(f) the lease granted to A., contained a proviso, that in certain specified events the lease should wholly cease and be void, and the lessors should be at liberty to re-enter. The defendant became the purchaser on a sale by the executors of A. On the margin of the abstract delivered by them was the following memorandum:—"The lessor consents to waive all forfeitures or right of entry which may have accrued to them by reason of the insolvency of A, and will join in the assignment to the purchaser." The lessor nevertheless refused to execute the assignment, stating, however, that she did not want to take [*544] advantage of the forfeiture, and gave a receipt for rent subsequent to the death of A. The purchaser refused, notwithstanding, to complete, unless she would join in the assignment, and the executors filed a bill against him for specific performance: there were two points—first, Whether A was, in fact, an insolvent? and, second, If the fact of insolvency were established, whether the lease was absolutely void? Sir Thos. Plumer being of opinion that the lease was only *voidable*, it became unnecessary to inquire into the first point. As to the second, he thus expressed himself,—“the proviso is, that if the rent shall be in arrear, and there shall be no sufficient distress on the premises, or if A. shall become insolvent, or shall fail to perform any of the covenants, the lease shall cease and be void, and the lessors may enter. There would be great inconvenience in holding that the effect of such a provision is to make the lease absolutely void in the cases specified. Upon the most trifling breach of covenant,—if, for instance, the rent should be unpaid a few hours beyond the prescribed time, the lease would be at an end; and, though the parties should deal together for years afterwards, upon the faith of its being a subsisting lease, neither of them could set it up again;” and, accordingly, referring to *Doe v. Bancks*,^(g) held “that the lease was voidable and not absolutely void,”—and, decreed specific performance of the contract.^(h)

(e) *Att. Gen. v. Mayor of Bristol*, 2 Jac. and Walk. 321.

(f) 2 Ves. 170.

(g) 4 Barn. and Ald. 401.

(h) And see *Doe d. Flower v. Peck*, 1 Barn. and Adolph. 428.

*Considerable difficulties in the way of titles are likely to grow out of a class of covenants by no means uncommon in [*545] the present day—that is to say, covenants entered into by the owners of particular land with the owners of other neighbouring or adjoining land, that the former shall not be built upon or planted, or so as to impose other restrictions upon the mode of enjoyment of land in favour of persons taking no property in such land. (i) Such covenants are of frequent occurrence in cases where the areas of squares or public walks are to be preserved, or where an uninterrupted view of the sea or of open country is to be secured to the owners of adjoining houses. Doubts, nevertheless, appear to have been extensively entertained, both as to the efficacy of such covenants for the purpose they are intended to answer, and as to their validity. With respect to the former, the principal ground of doubt has been, whether they would run with the land, so as to bind all successive owners of it. Judged by the usual rule, (and supposing the rule to be applicable,) perhaps this doubt may be thought to be unfounded; for they relate directly and immediately to the land. If such a covenant is not binding, at least in equity, on an assignee of the land, a title to property, the enjoyment of which materially depends upon it, must obviously be defective. What may be the effect of such covenants, whether they create at law any other than a personal obligation, [*546] does not appear to be a point which has yet called for decision. In a few cases, the subject has been brought before Courts of equity by suit against an assignee of the land. In some of these cases the Court has refused to interfere by way of injunction; but the validity of the covenant, or its binding the assignee, has never been negatived by decision. (k)—A title, how-

(i) An instance of a covenant of this kind is mentioned by Hale, in a note on Fitzherbert's *Natura Brevium*, tit. "Writ of Covenant," fol. 145, or, 8th edition, p. 341. He cites the Year Book, 4 Hen. 3, 57, which is not in print.

(k) Practitioners have, in many cases, resorted to other expedients for attaining the same objects; such as vesting the land, or a long term of years in it, in trustees, upon trust to continue it in the state intended to be guaranteed; or the creation of a rent, with powers of distress and entry to arise on the taking place of any alteration in the circumstances of the land.

And it has been doubted whether covenants of this description, (and, still more, trusts for the same purpose,) are not open to the objection of creating a perpetuity. Those who consider that they are so, argue that the doctrine of perpetuity is not confined to a restriction on alienation, but that it applies to every provision or engagement the effect of which may be to impede the free circulation of property in land; and they contend, that, in order to secure that freedom of circulation, land ought not to be capable of being subjected to any burthens or interests which the owner of the fee cannot discharge it from within the period of perpetuity, except rents, rights of way, light, and water, and other easements now acknowledged by the law.

It does not appear that this question has ever been discussed in any Court.

In the case cited by Hale, the covenant was held to be good; but this does not go far towards removing the doubt; for that case occurred at a period long before the law of perpetuity was introduced.

In cases where the property is of sufficient value to bear the expense, it has been usual to obtain private acts of Parliament. It cannot be said, that the Judges or the Legislature, in suffering such acts to be passed, have sanctioned the doubt alluded to, because there have been, in most such cases, other circumstances, such as the imposition of rates and making police regulations, which required the interference of Parliament. But, such frequent resorts to the Legislature, not to mention the heavy expense which they occasion, are objectionable, and certainly ought not to be encouraged, where individuals can make the engagements, which their mutual occasions may require, by means of common assurances. (Third Rep. of the Com. on the Law of Real Property, p. 53.)

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[*547] ever, *which involves the point, must, it is apprehended, be treated as being unmarketable.

Titles depending on the destruction of powers are frequently involved in great difficulty, though the learning on this subject has been a good deal cleared up by several recent decisions. In *West v. Bernéy*,^(l) the Master had reported that a good title could be made, to which exceptions were taken. The question arose on the following instruments:—A, seised in fee, conveyed the estate, in 1789, by way of settlement, to the use of himself for life, remainder to such of his children as he should appoint, remainder, in default of appointment, to his first and other sons in tail, remainder to himself in fee. In 1811, on his eldest son's marriage, there was a re-settlement. By a conveyance and recovery in pursuance thereof, to which A was a party, the estate was limited to the use of A for life, remainder to B, his eldest son for life, remainder to the first and other sons of B in tail, with divers remainders over; and power was given to the trustees, [*548] authorizing them, at the request of A, during his life, and, *after his death, at the request of B during his life, to sell the estate. A had not previously exercised his power of appointment in favour of his eldest son; and a doubt having arisen, whether the power was not still subsisting, and capable of being exercised in favour of A's other sons, so as to defeat the settlement, he in 1815 executed an appointment in fee in favour of his eldest son, reciting, that it was for the purpose of confirming the marriage settlement of 1811. Under the power of sale a contract was, it seems, entered into; and to the title it was objected, that the power of appointment in the settlement of 1789, being merely collateral, and for the benefit of particular persons, was an interest in them and in the nature of a trust in A, and could neither be released nor extinguished by him. Although Sir J. Leach did not decide the case on this point, upon an examination of all the authorities, he declared his opinion to be, "that every power reserved to a grantor may be released or extinguished, although he reserved no other interest in the estate; and that every grantee for life may in like manner release or extinguish it; and in the recent case of *Bickley v. Guest*,^(m) where the point called expressly for determination, he stated, "that, upon re-consideration, he continued of the same opinion, and decided accordingly.

The general principles as they appear now to be established, may be thus stated:—

[*549] 1. A power simply collateral, that is, a power to *a stranger who has no interest in the land, cannot be extinguished or suspended by any act of his own or other with respect to the land, nor released where it is to be executed for the benefit of another; though it may be released where it is for his own benefit, as if it be, for instance, a power to charge a sum of money for himself; and in such a case, his joining in a conveyance of the land, clear of the charge, would be a release.

2. Every power reserved by the grantor, whether he has retained an interest in the estate as tenant for life or otherwise, is an interest in him

(l) 1 Russ. & M. 431.

(m) 1 Russ. & M. 440.

which may be released or extinguished. It differs altogether from a naked authority given to a mere stranger, being, in point of fact, so much reserved by him out of the estate.⁽ⁿ⁾

3. Every power reserved to a grantee for life though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore, a power in gross may be extinguished. This seems now to be established; but, considered in the abstract, it appears to be a very questionable proposition, and can only be supported on technical reasons, and the tortious operation given to feoffments, fines, or recoveries. Being seised of the freehold, he can operate upon the inheritance by these assurances, and thus create estates inconsistent with the exercise of his power, and which, therefore, [*550] on the general *principle, that a man shall be estopped from [*550] defeating his own solemn acts, extinguish his power. It is submitted, that this is the true and only principle on which it can be contended, that a grantee for life may extinguish a power in gross.

The same reasoning does not apply to a release, which, being *droiturel*, conveys no more than what the grantor lawfully may, and consequently operates on his life estate; leaving the power, which is in the nature of a trust for other persons, untouched. Sir J. Leach, in *West v. Berney*,^(o) seems to think otherwise, after observing, that if the tenant for life were grantor, it is decided by *Albany's case*,^(p) and *Leigh v. Winter*,^(q) that it could be released, proceeds thus:—"And I think it may equally be released, if he is grantee, because his release must be to him who takes subject to the power; and the exercise of the power would be inconsistent with the release, which is a species of conveyance affecting the land." But he treats the point as doubtful.

A purchaser will not be compelled to accept a title depending upon a power of sale, introduced without authority into a settlement of executory trusts. This point was decided in *Wheate v. Hall*,^(r) which was a suit for specific performance. The Master reported in favour of the title, which was excepted to. It appeared from the abstract, that, in a suit for establishing a will, under which the vendors claimed, by the decree, on further directions, a reference *was directed to the Master, [*551] to approve a proper conveyance for settling the estate in [*551] question, to the several uses declared or directed by the will; the will gave no power of sale to the trustees, but, in the settlement approved by the Master, such a power was inserted, under which the contract in question was entered into. For the vendors it was alleged, that the power was to be or had been in some way brought under the notice of the Court, which either approved or did not disapprove the insertion, and therefore, that it conferred a valid authority for sale. Sir W. Grant was however of a different opinion.—"My opinion," said his Honour, "is, that whether that be or be not correct, is entirely out of the case, as the fact does not appear in any shape of which the purchaser can avail himself for the protection of his title. All that appears upon the face of the proceeding is, that there was a reference to the Master to approve a proper conveyance to the uses of the will. All that the Master in such a

(n) *Bird v. Christopher*, 5 Stiles, 389.

(p) 1 Rep. 111.

(r) 17 Ves. 89.

(o) 1 Russ. & M. 435.

(q) *Sir Wm. Jones*, 411.

case reports is, that he has approved a proper conveyance, without stating what the conveyance is. Unless some exception is taken to the draft, the Court has no opportunity of judicially deciding whether any particular clause should be introduced. There could therefore be no judicial decision, that this power was properly introduced into the settlement. It is difficult to say it was authorized by the will unless it is to be implied, and therefore ought to be inserted in every executory trust, the [*552] will being entirely silent upon the subject. *No great stress perhaps can be laid upon the direction to secure the estate to the successive devisees, as indicating an intention to exclude a power of sale; but, in the absence of any expression, from which the intention to include such power can be inferred, I am not aware, that it was ever decided, that the introduction of such a power under such circumstances is of course; nor have I learned that it is the practice to insert a power of sale in executing such a trust where the will is entirely silent. I therefore cannot think a purchaser ought to be compelled to take a title depending upon the validity of such a power."

Although it would be attended with very bad consequences to put purchasers upon exercising a very nice and critical judgment, with regard to the purposes for which powers have been created, yet a Court of equity will not sanction the application of a power to purposes clearly and obviously foreign to those for which it was originally created. Thus, in the last-mentioned case, by a settlement made in 1793, so far as it is material to state it, the estate in question was conveyed to trustees to the use of A for life, remainder to B for life; remainder to the first and other sons of B in tail, remainder to the survivor of A and B in fee. The settlement contained a power for the trustees at any time during the lives of A, B, and C, or of the survivor, to sell. B died in the lifetime of A, without issue, by reason whereof all the intermediate limitations to him [*553] and his issue failed. A made his will, and after reciting the settlement, gave all his real and personal estate to his two daughters, as tenants in common. In a suit for carrying the will into effect, the settlement already adverted to(s) was made; the Court being of opinion that under the power of sale therein inserted, a clear title could not be made to a purchaser; it was then contended that the power given by the settlement of 1793 still existed. With respect to that power it is to be observed, that it was introduced with reference to limitations which would have made a sale impracticable, if a power overreaching them had not been introduced; when, however, by the failure of all the intermediate limitations the estate for life of A became united with his reversion in fee, the power was no longer necessary to enable him to dispose of his interest; and any disposition he might afterwards make inconsistent with the exercise of that power, must, on the principle that a man shall not defeat his own acts, be considered as putting an end to it, either *pro tanto* or wholly, according to the nature of that disposition. By a will, therefore, devising the whole of his interest, the power must be considered as having been wholly extinguished. And Lord Eldon, adverting to a similar question in *Mortlock v. Buller*,(t) observes, "that though the power is gone at law, yet, if the purchaser had entered into the contract with the trustees, with the approbation of, &c.

(c) *Ante*, p. 551.

(t) 10 Ves. 314.

according to "the deed, that contract once entered into, and having bound the estate, though it could not be executed according to the power of sale, should be made good by those who had got an interest, by the effect of their interest, if not by the authority of the trustees,"—clearly implying, therefore, that in such a case a sale could not be made under the power. The same view of the question was adopted by Sir W. Grant. "It is not alleged," said his Honour, "that the power is now even colourably to be exercised for any purpose in the least degree connected with the settlement, not even for raising any charge to which the estate was subject by that settlement, or for facilitating the disposition of the estate by any party; but it is avowedly to be resorted to merely as an expedient to supply the want of a valid power in the settlement of 1805, and to enable those whom the owner of the fee has made only tenants for life to dispose of the estate. That I think an undue exercise of the power; and consequently a purchaser is not to be compelled to take a title depending upon it."

In *Brewster v. Angell*,^(u) a similar question was agitated. In a settlement approved by the Court in a suit for establishing a will, and carrying its trusts into effect,—the will containing a direction "that in such settlement there should be inserted all proper powers and authorities for making leases, and otherwise according to circumstances, to and for the *tenants for life, to be exercised by them at such times as they should be by law qualified so to do, and to be exercised [*555] by the trustees whenever such tenants for life should be disabled or disqualified by law to act freely, and of their own uncontrolled authority,"—powers of sale and exchange were introduced.^(v) Contracts were subsequently entered into for sale of part of the estate, but the purchaser objected to the title, on the ground that the power of sale was not authorised by the will. The inclination of Lord Eldon's opinion was, "that this was not a proper power, but he was quite clear he could not compel a purchaser to take a title depending on it." Adverting to *Wheate v. Hall*, he observes, "that the Master of the Rolls there held, that unless the insertion of such a power was authorized by the direction to make a settlement, it could not be introduced, and that there was nothing express with respect to such a power, and nothing from which to imply it. And without entering into the question whether he was right or wrong, it appears to me, if he held that, where nothing is expressed nothing can be implied; it is impossible, where something is expressed, I can imply more than is expressed; and particularly where the will notices what powers are to be given, and to whom they are to be given."

"A purchaser will not be compelled to accept a title depending upon a power of sale in a settlement made pursuant [*556] to marriage articles, if the power in the settlement deviate from the terms of the articles; nor will he be compelled to complete when the terms of the authority have not been strictly complied with. Both points occurred in *Hall v. Dewes*.^(w) By articles made previous to marriage, it was provided, that, in the settlement to be executed in pursuance there-

(u) 1 Jac. & Walk. 625.

(v) Exceptions, but not as to the insertion of the power, were taken to the Master's report; they were overruled, and the settlement executed by all parties. See *Horne v. Barton*, 19 Ves. 398; S. C. Coop. 257.

(w) 1 Jac. 189.

of, "a power should be contained to enable the tenant for life, with the consent of A, B, and C, (the trustees,) their heirs or assigns, to make sale, &c.; and that it should be lawful for the said A, B, and C, or the survivor, his executors or administrators, to give good discharges for the purchase-money;" and the settlement was to contain the usual and full powers for the appointment of new trustees. It was also provided, that any variation might be made, in the form and order of the articles, and the uses and trusts thereof, which would better effectuate the intention of the parties thereto, as therein expressed. In the settlement made after the marriage, in pursuance of these articles, a power of sale was reserved to the tenant for life—"by and with the consent and approbation of the said A, B, and C, or the survivors, or the survivor of them, or of the heirs or assigns of such survivor, or of the trustees or trustee for the time being." A went abroad, and a new trustee was appointed [*557] in his place; B died, and before his place had been supplied an agreement was entered into for sale of the estate to the persons under whom the vendors claimed, and a conveyance was made to them by C and the trustee appointed in the place of A. It was now objected to the title that the conveyance to the plaintiffs was not a due execution of the power contained in the articles and settlement. It seems to have been considered—

1st. As being clear that, the settlement not corresponding with the articles, the sale could not be supported under it; and that, on the authority of *Stanley v. Stanley*,^(x) this deviation was not helped by the clause directing that the settlement should be framed so as best to effectuate the intention.

2nd. That the sale, therefore, must, if at all, be supported as an exercise of the power contained in the articles; and on the authority of *Townsend v. Wilson*,^(y) Lord Eldon, though he appears to have disapproved of that decision, refused to enforce the contract. "He believed that he should not have been induced so to decide it, but he could not make the defendant take the title upon any opinion of his. It must be understood, that he proceeded on the ground, that he could not compel [*558] the purchaser to *accept the title; for, he should be sorry to have it recorded that he agreed to that case."^(z)

The result of the cases which have been considered, therefore, is, that where there is the slightest difficulty as to the law, the Court will not, whatever may be its own opinion, enforce the contract.

(3) *Title unmarketable from non-compliance with prescribed formalities.*

Where a title is derived through a conveyance professing to be made under some specified authority or power, enabling that conveyance, it

(x) 16 Ves. 491.

(y) 1 Barn. & Ald. 608. In that case a power of sale was reserved to three trustees and their heirs, one of the trustees died, and the surviving trustees executed the power. Held, that the power was not well executed, although the deed expressly provided that the money arising from the sale should be entrusted to the trustees for the time being, and although it also reserved a power in case of death, &c., to appoint new trustees.

(z) And see *Bradford v. Belfield*, 2 Sim. 264.

is frequently defective from non-compliance with the terms of that authority, or the forms directed to be observed in the execution of it. The consideration of this question where the authority or power arises under the statute of uses, would lead to a field of inquiry beside the purposes of the present essay; and for information on this head the treatises on Powers must be consulted. A few remarks will be added on titles derived through conveyances under acts of Parliament(1), and decrees of a Court of equity(2).

1. The conveyances authorized to be made by public acts of Parliament, are usually attended with several inconvenient requisites, and, like the exercise of other powers, receive a strict construction; consequently, the evidence, necessary to show that all the forms have been complied with, becomes a necessary *part of the title, and it can seldom be obtained without much trouble and expense. [*559] When a sale has been made by the commissioners under the general inclosure act for payment of expenses, it must be proved that six weeks' notice of the sale was given in the manner in which other notices are directed to be published by the local act, which usually requires certain advertisements, and the affixing of the notices on the church-door; and therefore it is necessary to produce the newspapers, and an affidavit that the notices were duly put up.

When a sale has taken place under the insolvent debtors' act, it must be proved that advertisements were inserted in the London Gazette and another newspaper to give notice of the meeting of the creditors for approving the manner and place of sale, fourteen days previous to the meeting; and that the creditors who signed the approbation, were the major part, in value, present at the meeting; and the resolution, and also the particulars of sale, must be produced, to show that the meeting was held thirty days before the sale, and that the sale took place within six months after the execution of the conveyance to the assignee; or, if six months had elapsed, that an order of the insolvent Court to extend the time of sale had been obtained.

When a title is to be shown to land which was part of the glebe of a living, and has been exchanged under the 55 Geo. 3, c. 147, three newspapers must be produced to prove, that notice of the intended exchange was given by advertisements in certain papers, for three successive weeks, six months *before the exchange; and plans and valuations both of the estate given, and the estate taken in [*560] exchange; the affidavit of the surveyor to verify them; the commission of inquiry directed by the bishop; the return of it properly signed; and a certificate, that the deeds, plans, valuations, commissions, and returns are deposited in the office of the registrar of the diocese, must be produced; and it must be proved that notice of the intended exchange was fixed, for three successive Sundays, on a conspicuous part of the church-door, shortly before the commencement of service, six months before the exchange; that the surveyor who made the plans and valuations was approved by the incumbent, patron, and ordinary; that three of the persons to whom the commission of inquiry was directed, were beneficed clergymen, resident in the neighbourhood; that one was a barrister, that he was of three years' standing, that he was named by a judge, and that such judge was the senior judge named in the last commission of *nisi prius* for the county.

Similar inconvenient regulations are contained in the powers for charging rates for building and enlarging churches under the late acts, and in several other acts which authorize conveyances or charges to be made.(a)

If in titles derived under these and other like acts of Parliament, such directions as have been adverted to are not observed, the title is unmarketable.

2. A party purchasing under the decree of a Court of equity is bound [*561] to see that the sale is made according *to the decree. If he take a title to an estate sold under a decree, but not in conformity with the terms of that decree, he will not be protected by it,(b) —sales under decrees being entitled to protection when they are conformable to the decree, not otherwise. Neither can a party who has made a purchase contrary to the authority of a decree, be permitted afterwards to conform, for the purpose of taking the benefit of it. And, therefore, where the provision of the decree was, that the estate should be sold, subject to incumbrances prior but not subsequent to the date of a certain settlement; and as to these latter incumbrances the decree directed that the estate should be free from them; and a sale having been made, subject to annuities created after the date of the settlement; the sale was declared to be fraudulent and void, and a re-conveyance directed upon terms of redemption.(c) And though in this case Lord Eldon seems to have thought it might “be consonant to moral justice to set a value upon the annuities,” and add that value to the purchase-money; yet, on the principle already stated, that a party purchasing contrary to the authority of a decree cannot be permitted afterwards to conform, for the purpose of taking the benefit of it, his Lordship held, that the purchaser was not entitled to this kind of relief. By the decree made [*562] in the cause, the Master was *directed to inquire what parts of the estate were most fit to be sold. No report was made on that point: but whether that defect would affect the purchaser, is not settled. Lord Eldon, however, seems to have thought that it would not, since the Court itself ought to have noticed that defect in its proceedings.(d) There was another point in the same case, namely, Whether the circumstance of the estate being sold subject to leases, which had been granted under pretence of a power contained in the settlement, but which were in fact contrary to it, was a sufficient ground for setting the sale aside? But the appeal was not decided on this ground, though it may be inferred from the language of Lords Eldon and Redesdale, that if there had been clear evidence of the grant of the leases having been fraudulent, the sale, subject to such leases, would have been set aside.

On the other hand, a purchaser will not be protected by a decree obtained in an imperfect suit, such a decree not being binding as to persons not parties to the suit, and whose rights are affected by it.(e)

Mere irregularities in a decree are not, however, sufficient grounds

(a) First Rep. of the Real Property Com. App. p. 518.

(b) “But at all events it is clear that a decree not obeyed but violated, cannot be a protection for a purchaser.” Per Lord Eldon in *Colclough v. Sterum*, 3 Bligh, 189.

(c) *Colclough v. Sterum*, 3 Bligh, 181.

(d) *Colclough v. Sterum*, 3 Bligh, 184.

(e) *Giffard v. Hort*, 1 Sch. & Lef. 386; *Colclough v. Sterum*, 3 Bligh, 186.

for impeaching a sale made under it. This proposition is well illustrated in *Bennett v. Hamill*,^(f) where Lord Redesdale, in considering the effect of such irregularity, is reported to have thus expressed himself:—"The principal question *in this case is, whether a sale under a decree of a Court of equity is to be impeached [*563] on the grounds on which this is sought to be impeached. First of all, it is stated, that this is a case in which the heir of the debtor, as not being of age, ought to have had a day to show cause against the decree, and for this reason, that the decree necessarily required his joining in the conveyance of the estate; I incline to think, that that was so; that the decree in that respect was erroneous; and that there ought to have been a day to show cause. Another objection is, that there was no sufficient account of the personal estate; and that the proceedings before the Master were a fraudulent contrivance between Mary Bennett and Johnson. That certainly, between them, and as far as their interests would be affected, is a subject which would require investigation. As to Mary Bennett, she has put in that sort of answer to the interrogatories, that would enable the plaintiff, as against her, to have made good to him all the damage, which she says he has sustained; her account would also, if true, affect Johnson in the same way. But as to Hart's representatives, and Hamill, the question is, whether they are persons who can be affected, supposing the circumstances to be clearly true as stated; namely, that there was error in the judgment of the Court, in not giving a day to show cause; and error also, in directing a sale under the circumstances. Now, on that subject, I must confess, after considering this a good deal, I think it would be too much to say, that a purchaser *under a decree of that description can be bound to [*564] look into all these circumstances; if he is, he must go through all the proceedings from the beginning to the end, and have the opinion of the Court, that the decree is right in all its parts, and that it would be impossible to alter it in any respect. The cases warrant no such opinion. On the contrary, as far as I can find, the general impression they give is, that the purchaser has a right to presume, that the Court has taken the steps necessary to investigate the rights of the parties; and that it has, on the investigation, properly decreed a sale; then he is to see that this is a decree binding the parties claiming the estate, that is, to see that all proper parties to be bound are before the Court: and he has further to see, that, taking the conveyance, he takes a title that cannot be impeached *aliunde*. He has no right to call upon the Court to protect him from a title not in issue in the cause, and no way affected by the decree; but if he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate his title, although the decree may be erroneous, and therefore to be reversed, I think the title of the purchaser ought not to be invalidated. If we go beyond this, we shall introduce doubts on sales under the authority of the Court, which would be highly mischievous."^(g)

(f) 2 Sch. & Lef. 575.

(g) The great length to which the Court will go in supporting a purchase made under a decree, is well shown in the case of *Lloyd v. Johns*, where were not only very great irregularities, but also considerable evidence of fraud. (9 Ves. 37.)

**(4) Title Defective in respect of Incumbrances, which cannot be shown to be discharged.*
[*565]

A purchaser before completing his contract is entitled to have discharged every incumbrance which appears on the abstract, or of which he otherwise has notice; unless there be either an express or implied agreement to waive it.^(k) But if the contract be completed by the payment of the purchase-money, and the execution of the conveyance by all necessary parties, and the purchaser be afterwards evicted by a title to which the covenants do not extend, he cannot recover his purchase-money either at law⁽ⁱ⁾ or in equity;^(k) and it makes no difference whether the purchase-money has been actually paid or only secured;^(l) nor that the purchase is made under a decree; and the money still in Court, to be applied pursuant to it, on the ground that the Court has done all it can for the purchaser, having given him possession of the estate and a title which he himself had previously approved.^(m)

And the principle is the same where the money has been invested in the names of trustees,—the purchaser having taken his covenants for title must rely *on them, and he has no lien on the money [*566] in the hands of the trustees;⁽ⁿ⁾ but as fraud vitiates every transaction which it touches, if the vendor, after conveyance and payment of his money, be evicted in consequence of a defect of title, which the vendor knew of but concealed from the purchaser; the latter may have relief, either at law, in an action on the case, or in equity, by a bill for relief; but, as a judgment obtained after the death of the vendor, in an action of this nature, can only charge his property as a simple contract debt, and will not therefore, unless under very special circumstances, charge his real assets, a Court of equity will, in most cases, afford a better remedy, inasmuch as a purchaser can have a more complete discovery of the circumstances of the concealment, which will frequently be such as to create a trust in his favour; and if on the circumstances there be any doubt of the fact, the Court will direct an issue to try, whether the vendor did or did not know of the incumbrance.^(o)

Where the vendor knows of a defect in the title to part of the estate, material to the enjoyment of the rest, and does not disclose it to the purchaser, and it cannot be collected from the abstract, equity will, even before eviction, rescind the contract. This point underwent great discussion, and was so decided for the first time in the recent case of Edwards [*567] v. M'Leay.^(p) The defendants, representing themselves *to be seised of the fee simple of a messuage, stables, coach-house, lands, and hereditaments at Clapham, conveyed the same in performance of a previous contract to the plaintiff in May, 1811. Soon after the com-

(k) *Vane v. Lord Barnard*, Gilb. Eq. Rep. 6.

(i) *Cripps v. Reade*, 6 T. R. 506; *Bree v. Holbech*, Doug. 654.

(k) *Serjeant Maynard's case*, 2 Freem. 1; S. C. 3 Swanst. 651; *Urmston v. Pate*, Chan. 1st Nov. 1794, stated in 4 Cruise's Dig. 90, sec. 64.

(l) See *contra*, Anon. 2 Ch. Ca. 19; but the case has never been considered of authority, and is, in fact, answered by the reporter upon it.

(m) *Thomas v. Powell*, 2 Cox, 394.

(n) *Cator v. Earl of Pembroke*, 2 Bro. C. C. 282.

(o) *Harding v. Nelthorpe*, Nels. Ch. Rep. 118.

(p) 1 Coop. 308; S. C. affirmed on appeal, 2 Swanst. 287.

pletion of the contract the purchaser discovered that part of the fore-court and the driving-way or road leading up to the house, and the whole of the ground upon which the coach-house and stables stood, had been part of Clapham Common, and were, in 1781, inclosed and taken from it. The plaintiff by his bill charged that the defendants were aware of this circumstance, and, not having disclosed it to him, were guilty of a gross fraud and imposition, and that he could not have discovered it from the abstract; and the bill therefore prayed that the contract might be declared void, and the defendants be ordered to repay the plaintiff his purchase-money, and what he had laid out on the premises, with interest. Evidence was gone into, on the part of the plaintiff, to show that the ground on which the coach-house and stables stood was part of the common, and that the defendants were fully aware of this circumstance at the time of their entering into the contract with the plaintiff. There was also some evidence on the part of the defendants, for the purpose of showing that the plaintiff was as fully conuzant of this usurpation as they were. Sir Thomas Plumer's judgment, given after great consideration, and in writing, commences in these words—"This is a bill of rather an unusual description. It is brought by the purchaser of an estate, [*568] *who has had a conveyance made to him, for the purpose of [*568] setting aside the sale and getting back his purchase-money, on the ground of an alleged misrepresentation with regard to the title to a part of such estate. It cannot certainly be contended, that, by the law of this country, the insufficiency of a title, even when producing actual eviction, necessarily furnishes a ground for claiming restitution of the purchase-money. By the civil law it was otherwise. By our law a vendor is in general liable only to the extent of his covenants; but it has never been laid down that, on the subject of title, there can be no such misrepresentation as will give the purchaser a right to claim a relief to which the covenants do not extend. In the case of *Urmston v. Pate*, there was no ingredient of fraud. Both parties misapprehended the law. The vendor had no knowledge of any fact which he withheld from the purchaser. In the case of *Bree v. Holbech*, (9) it did not at all appear that the party knew that the mortgage which he assigned was a forgery. Lord Mansfield says—"if he had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different." And the plaintiff had leave to amend his replication, in case, upon inquiry, the case would support a charge of fraud. Whether it would be a fraud to offer, as good, a title which the vendor knows to be defective, in point of law, it is not necessary to determine. But if he knows and conceals a fact material to the validity of the title I am not *aware of [*569] any principle on which relief can be refused to the purchaser. What then is the case made by this plaintiff? He asserts that the vendors knew that the part in question was an inclosure from the common, that they did not disclose the fact to him, and that he could not discover it from the abstract. He also asserts, that this part of the purchased premises is material to the convenient enjoyment of the rest. The defendants admit that they did make such representation, as is stated, with respect to the whole of the premises; they say they do not believe that any of those premises ever did compose part of the common; but

supposing the fact to be otherwise, they deny that such fact was within their knowledge. They admit that no such fact appeared on the abstract, and they also admit the part in dispute to be material to the enjoyment of the rest of the premises sold. The points, then, on which the parties are at issue, are only these two: Was this at any time a part of the common? Was it known by the defendant so to have been?"

His Honour, upon the evidence, which he examined at great length, being satisfied that both these questions ought to be answered in the affirmative, proceeds thus:—"The only other objection which the defendants make to the relief sought by the bill is, that the plaintiff is premature in his application, inasmuch as he has not yet been evicted, and may, perhaps, never be evicted. But I apprehend that a Court of equity has

[*570] quite ground enough to act upon, and that it ought now to relieve *the plaintiff from the consequences of the fraud practised upon him. It may be true, that the commoners are barred by having acquiesced for more than twenty years in the inclosure; but the lord will not be conclusively barred till sixty years shall have elapsed. I have already observed, that the defendants do not pretend that there is any circumstance from which a title in them can be inferred, supposing the fact established, that this made part of the common. Though the lord may never assert his right, is the plaintiff to be compelled to remain for twenty-five years longer in a state of uncertainty, whether, on any day during that period, he may not have the convenience of his habitation entirely destroyed? I apprehend, that the Court is bound to relieve him from that state of hazard into which the misrepresentation of the defendants has brought him. There must, therefore, be a decree for setting aside the sale, and repaying the purchase-money with costs. The defendants must, likewise, pay to the plaintiff all the expenses he has been put to relative to the sale; and he must have an allowance for any money he laid out in repairs during the time he was in possession."

From this judgment there was an appeal to Lord Eldon.(r) "The case," said his Lordship, "resolves itself into this question, whether the representation made to the plaintiff was not, in the sense in which we use the term, fraudulent? I am not apprized of any such decision; but I agree with the Master of *the Rolls, that if one party makes [*571] a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this Court will rescind the contract. In principle, therefore, the decree is right; though it seems to have gone too far on the subject of repairs and improvements. Its terms must be made conformable to the terms of the bill; striking out the word 'improvements,' and leaving the word 'repairs,' I give the plaintiff all that he asked by his bill, and I cannot give him less."

It has been observed, that a purchaser is entitled to the discharge of all incumbrances of which he has notice. It becomes, therefore, important to know what *notice* is; and it cannot be more clearly explained than in the language of the Second Report of the Real Property Commissioners:—

"Notice, according to the rules of equity, is not confined to actual

knowledge or information in the ordinary sense of these words. The doctrine of notice has been expanded into a system of great subtlety and refinement.

"Notice is either actual or constructive; but for most purposes there is no difference between them in their consequences.

"It is laid down in the books, that actual notice must be given by, or on behalf of, a person having a claim on the property, and in the course of the treaty for the purchase; and that it must not be vague report or assertion of such claim, not even *a general claim, without [*572] reference to particulars. Yet a book of high authority states, that—'no person could be advised to accept a title, concerning which there were any such reports or assertions, without having them elucidated; because, what one judge might think a flying vague report, another might deem a good notice.'(s)

"Constructive notice is scarcely susceptible of definition; and it seems admitted, that no certain rules, as to what shall amount to constructive notice, can be laid down. We shall state some of the many instances of it which are to be found in the books.

"Notice to the counsel, agent, or attorney of the purchaser, or to the sub-agent, as the London agent of the country attorney, employed in any part of the transaction, is held to be notice to the purchaser, although it may be clear that the fact was not communicated to him; although its importance may not have been understood by the agent; although, if employed (as frequently happens) by both parties, he may have received, as agent for the one, what it became his duty to make known to the other; and although the purchase may have been made without the purchaser's knowledge, and he may afterwards have adopted it on the agent's representations. This species of notice is frequently treated as actual notice.

"A suit in equity, unless collusive, is, during its continuance, constructive notice to all persons of the claim raised by it, although the purchaser of the estate, *and his agents, may never have [*573] heard of such suit. A suit determined ceases to operate as notice; but it appears to have been considered, that an appeal from a decree would recall the suit into existence, so as to affect a purchaser in the interval with notice.

"It is held, generally, that whatever is sufficient to put a purchaser upon inquiry, is good constructive notice; in other words, that when a man has sufficient information to lead him to a fact, he shall be deemed to know such fact. When a title is made out through a deed, the purchaser has constructive notice of every fact, to the knowledge of which that deed leads, by recital, by description of the parties, or otherwise, immediately or remotely. So a purchaser, who has notice of a deed, has constructive notice of all its contents, though his advisers may not have thought it necessary to examine or require the inspection of the deed. Where an estate is in the occupation of tenants, the purchaser is deemed to have notice, not only of their actual leases, but of any agreements relating to the property which the tenants may have made with their landlords."(t)

(s) Sir Ed. Sugd. Vend. and Purch. p. 741.

(t) Second Report of the Real Property Commissioners, p. 11.

Besides the incumbrances which appear on the abstract, there are others arising from judgments, recognizances, Crown debts, the pendency of [*574] suits, acts of bankruptcy and insolvency, which, as they *create liens on, or otherwise affect, real estate, it becomes necessary for a purchaser to be assured that there are none such existing at the time of completing his contract, or, if there be, to procure the discharge or satisfaction of them; and, therefore, it is incumbent on those who take upon themselves the responsibility of approving the title on behalf of the purchaser, to ascertain by proper searches and inquiries, whether such incumbrances exist.

1. A suit depending in the courts is binding on all persons, and it is therefore necessary to ascertain whether the estate be the subject of any suit; and if so, then the proceedings in that suit become a part of the vendor's title, and the purchaser is entitled to have them abstracted in chief, for the purpose of ascertaining their effect upon it.

It is to be observed, however, that not every *lis pendens* amounts to notice. For the learning on this subject, the recent case of *Kinsman v. Kinsman*,^(u) and the authorities there cited, may be consulted.

2. The circumstance of any part of the estate being in the occupation of a tenant, is considered to be full notice of the interest of the tenant, and of the rent and other terms of the lease. It is, therefore, necessary to inquire of every occupier the nature and extent of his interest.^(v)

[*575] *3. When persons are indebted to the Crown, the estates, to which they may be entitled during the existence of any part of the debt, remain liable to the remedies of the Crown, notwithstanding the sale and conveyance of them; and therefore it is necessary

(u) 1 Russ. and M. 616.

(v) Although a party purchasing with notice of a tenancy, takes subject to all the rights of the tenant, yet, where the vendor undertakes to make an express representation with respect to the tenant's interest, and that representation turns out to be unfounded, he must submit to the consequences of the misrepresentation, notwithstanding the purchaser, by making inquiry of the tenants, might have ascertained the nature of his rights, on the plain principle, that a purchaser buying with notice of a tenancy, has only constructive notice of his rights, which is, of course, superseded by an express representation from the landlord as to that matter. Thus, in *Besant v. Richards*, (Taml. Rep. 509,) which was a suit to enforce performance of a contract for the purchase of an inn, at the time of the contract, in the possession of a tenant. The contract merely stipulated for the amount of the purchase-money, and that the title should be made good, and the sale completed at Michaelmas then next. Previously to the treaty, however, the vendor said the agreement under which the tenant then held the inn was good for nothing, and that he had served him with a notice to quit at Michaelmas, and would give the plaintiff, who was the purchaser, possession at Michaelmas. The agreement was, in point of fact, for a ten years' term. Sir J. Leach, M. R., held—That the plaintiff ought not to be bound by the contract, purchasing, as he did, on the faith of that representation; and that he was entitled to be released from the agreement, or to have it performed with compensation.

Neither, where the possession is vacant, is a purchaser bound to inquire of the late occupier what was the nature of his title. On this principle, in a recent case, (*Miles v. Langley*, 1 Russ. and M. 39,) under an agreement of exchange between A, who held lands under a college lease, and B, the owner of an adjoining estate: B occupied part of the college lands, and A had occupied, along with the residue of the leasehold, part of B's estate. A having become bankrupt, the college leasehold was sold, and was described in the particulars of sale as "late the residence of A," it was held, that the purchaser was not to be considered as having implied notice of the agreement of exchange, and that he had a right to recover by ejectment that portion of the leasehold which was in B's occupation. That a purchaser with notice of the vendor's solicitor being in possession of the title deeds is not within the principle here stated; and, consequently, not bound to inquire as to the nature of the solicitor's interest in them. See *Bazon v. Williams*, 3 You. and Jerv. 150.

*in all cases to inquire, whether the present or any of the late owners have had any accounts with the Crown, or have [*576] given any security for any receiver or other public accountant? The fact can never be ascertained with certainty, because there is no place in which the existence or the amount of debts due to the Crown can be discovered; but it is usual, and is considered necessary, to ask the solicitor and connections of the parties, if they are aware of any such debts, and to make inquiries in any of the public offices with which the circumstances of the owner may render it probable that he may have had any dealings.

4. Judgments which are docketed in any of the Courts of law, become liens on the estates of the person against whom they are entered up, and on those which he may afterwards acquire; it is therefore necessary to search for judgments in all the Courts against every person who may have been the owner of any part of the estate. The dockets or books contain the names, without any other description; and when a judgment against the name of an owner is discovered, the person bound to show a good title must procure it to be satisfied, or proof to be given that it applied to a different person of the same name. The latter fact is usually shown by a certificate of the solicitor who obtained the judgment, stating the residence and description of the person against whom it was entered up. When an estate has belonged to several persons, the expenses of searching for judgments, and of showing to whom those which may be *found relate, become enormous; and a serious difficulty [*577] arises where the name of any of the owners is one of common occurrence, Upwards of five hundred judgments will be found against any such name as Smith, White, Brown, Taylor, &c. In those cases it cannot be expected that the owner should procure certificates from all the solicitors who obtained the judgments, and yet there is no other means by which it can be proved that the title is not affected by them. A willing purchaser is usually satisfied with an affidavit or certificate from the solicitor of the owner, that he is confident that none of the judgments relate to him; but it has not been decided, whether the objection does not render a title unmarketable.(w)

5. Annuities, with a few exceptions, are required by acts of Parliament to be inrolled, and it is the duty of the solicitor to search for them.(w)

6. If the estate be in Middlesex, Yorkshire, or the Bedford Level, the local register must be examined, and there is no occasion for any other search for judgments and annuities; but, in consequence of the inconvenient regulations under which the registers are established, and the unnecessary inquiries which they occasion, searches there are attended with as much trouble and expense as those for judgments and annuities in other cases.(w)

A heavy responsibility is imposed upon solicitors in the examination of the abstract, and in searching *for defects and incumbrances. If these duties are not carefully performed, they [*578] are answerable for any loss which their client may sustain by their negligence; and the danger of overlooking errors in the technical proceedings connected with different complicated assurances, or of a name in the

various lists at the different offices, and the other difficulties of making accurate searches must frequently render them liable to heavy losses. (x)

Searches for judgments are usually confined to the last purchaser, and to the persons deriving title under him, on the assumption that, on each succeeding purchase, the purchasers did their duty, and made the proper searches; searches, however, which are manifestly incomplete, as judgments bind after-purchased lands.

The extent to which searches ought to be made has, however, been greatly abridged, and the security of purchasers from judgment creditors greatly increased, by the recent decision in *Doe v. Jones*, (y) which established the principle, that 'a person deriving title by appointment from the debtor, and therefore being in immediately under the deed creating the power, is entitled to hold the lands, unaffected by judgments against the donee of the power.' The facts were these: In Michaelmas-term, 1822, judgment was entered up against A, at the suit of the defendant, who, on the 13th December, 1827, sued out a writ of *elegit* thereon, and

[*579] an inquisition *being duly taken on the said writ, finding the seisin of A. the sheriff delivered the lands in question to the defendant. The seisin and title of A, commenced under indentures of lease and release, of the 30th Nov. 1826, by which the lands had been conveyed to A in fee, with the usual limitation to uses to bar dower. By an indenture of the 29th March, 1827, A, in execution of the power given him by the limitations to bar dower, appointed, and he also demised, these lands to the lessor of the plaintiff for a term of 500 years, by way of mortgage. In an action of ejectment by the mortgagee, the question was, whether he, claiming under the appointment, or the defendant, claiming by virtue of his judgment, had the better title. In other words, whether the debtor, by making the title of the mortgagee depend on the power of appointment, and not on his own estate, had not defeated the title of the judgment creditor? And the Court of King's Bench held that the title of the judgment creditor was defeated. Lord Tenterden, delivering the judgment of the Court, said—"It has been established ever since the time of Lord Coke, that where a power is executed, the party taking under it takes under him who creates the power, and not under him who executes it. The only exceptions are, where the person executing the power has granted a lease or any other interest, which he may do by virtue of his estate, for, then, he is not allowed to defeat his own act. But suffering the judgment is not within [*580] the exception as an act done by the party, for it is considered as a proceeding **in invitum*, and therefore falls within the rule;" and it was accordingly held that the plaintiff was entitled to recover.

The practical conclusion is—that whenever a vendor conveys in exercise of a power of appointment, it will be unnecessary to seek for judgments, as against him.

Although a judgment does not bind leasehold estate till a writ of execution has been taken out and delivered to the sheriff, yet, as the sheriff will not allow his office to be searched, lest the object of the execution should be thereby defeated, it is necessary to search for judgments, and if any be found, a purchaser cannot safely complete without their being

(x) 1st Rep. of the Real Prop. Com. App. p. 517.

(y) 10 Barn. and Cress. 459.

satisfied, or its being shown that no writ of execution has been issued upon them. As an equity of redemption is not extendible, it is clear that a purchaser could not be affected even by a writ of execution being issued, as that could not be considered to be notice to the purchaser.

Judgments not docketed or entered do not affect real estate as to purchasers or mortgagees, nor have they any other effect than as a simple contract debt in the administration of assets;(z) but it has been held, that a purchaser, who has actual notice of an undocketed judgment, is bound by it.(a) Lands, also, of which any person is seised or possessed in trust for a judgment debtor "at the time of the execution," are, by the statute of frauds, liable to "be taken in execution in the hands [*581] of the *cestui que trust* or his heirs, but not in the hands of [*581] an alienee before execution sued out.(b) Upon this provision, it has been held, that an equity of redemption is not extendible,(c) and therefore a purchaser, without notice of judgments subsequent to the contract, will hold discharged from them, for he has the legal estate, and as good an equity as the judgment creditor; but if he have notice of subsequent judgments, he cannot be advised to complete without seeing them discharged, though it has been a question whether or not he would be affected by them,—a point which has never been expressly decided, though, on principle, it should seem that he would.

Subject to the provisions of the statute of frauds, judgments against the *cestui que trust* being equitable liens only, they are void as against a purchaser getting in a prior legal estate.(d) But this protection can be relied on only where the purchaser had no notice of the judgment at the time of the purchase,—the term sufficiently old to exclude the possibility of antecedent judgments,—and not so situated that a surrender could be presumed. As such a protection prevails only where the purchaser has no notice, he will, of course, if he mean to rely on the legal estate as a protection, make no searches or inquiries after judgments, as the mere entry and docketing of judgments are not notice. But though a purchaser who has got in an "outstanding legal estate, may rely [*582] on it as a protection against secret incumbrances, yet there [*582] is ground to contend that his title is not marketable, and that a subsequent purchaser, with notice of an incumbrance existing at the time of the former purchase, may refuse the title; because the absence of notice, at the time of the former purchase, does not admit of proof.(e)

Where an estate is conveyed to trustees upon trust to sell and pay debts, &c., and to pay the surplus money to arise by the sale to the grantor, and the receipts of the trustees are made sufficient discharges to the purchaser, the better opinion seems to be, that a purchaser is not bound by subsequent judgments, of which he has even express notice;(f) but the point has never been decided. In a recent case of *Lodge v. Lysley*,(g) it underwent a good deal of discussion; but it ultimately became unnecessary to decide it, the case being disposed of on other grounds.

(z) 4 and 5 W. and M. c. 30; *Landon v. Ferguson*, 3 Russ. 349.

(a) *Davis v. The Earl of Strathmore*, 16 Ves. 419. (b) 29 Car. 2, c. 3, s. 10.

(c) *Lyster v. Dolland*, 1 Ves. Jun. 435; *Scott v. Scholey*, 8 East, 467.

(d) *Willoughby v. Willoughby*, 1 T. R. 763.

(e) 2nd Rep. of the Real Prop. Com. 12.

(f) Sir Ed. Sugden's Ven. and Purch. 481, 8th ed.

(g) V. C. 28th March, 1832, MS.

In that case, A being possessed of a life interest in certain estates in the county of Wilts, with remainder to his son B in tail, had created various incumbrances by way of annuity and judgment debts upon his life estate, to the amount of about 80,000*l.*, and, in 1826, when B came of age, the entire rental of the estate was insufficient to pay the annuities and interest [*583] of the incumbrances. The father and son agreed to bar the *entail, and sell the estate; out of which 30,000*l.* was to be paid to the father for his life interest, beyond payment of the above incumbrances; and, subject to provision for other parties, the surplus of the estates was for the benefit of the son. By indenture of the 9th Feb. 1827, the estates were vested in trustees to carry this arrangement into effect; and a recovery was, in 1829, suffered to bar the entail. In the month of May, 1830, sales of large portions of the estate were completed, and out of the purchase-moneys the aforesaid incumbrances were discharged. By contracts, bearing date the 26th May, and the 4th August, 1831, the defendant agreed to become the purchaser of other large portions of the estate. Subsequent to the conveyance to trustees of the 9th Feb. 1827, several judgments were signed and docketed against A, upon which he was charged in execution, and, at the time of filing the bill for the specific performance of these contracts, was a prisoner in the King's Bench prison. And the question was, whether these judgments, of which the purchaser had notice, constituted a lien in equity upon the land? and, therefore, whether the purchaser was entitled to have them satisfied before completing the purchase?

Sir L. Shadwell, in giving judgment, said—"He had not a doubt upon the case: The son, by amalgamating his estate tail in remainder with the estate of the tenant for life, became a purchaser of the benefit of the contract, and might have filed a bill for a sale. [*584] *It was of the very essence of the contract, that the trustees should convey the legal estate, and give the purchaser a good discharge. This case had not the slightest resemblance to the three which had been cited.^(h) It most resembled the case of Serjeant Hill; and he should not have given the opinion given in that case."

Judgments being a lien only on real estate, if the land had, previous to the entering up of the judgment, been converted into personalty by a conveyance upon trusts, as if, for example, it had been conveyed upon trust to sell for the benefit of creditors, no judgments subsequent to the conveyance are deemed specific liens on the property, so as to render releases or satisfaction essential to the security of the purchaser. In order to have this effect, the trust must of course be created *bond fide*, and not fraudulently, with a view to defeat creditors.

Though a contract for sale is, as between the vendor and purchaser, a conversion of the realty into personalty, and the purchaser will have a good title against subsequent judgment creditors, to the extent that he has paid his purchase-money, even if he had not taken a conveyance,⁽ⁱ⁾ or have taken *one which is defective;^(k) yet all judgments [*585] obtained against the vendor subsequent to the date of the

^(h) Forth v. Norfolk, 4 Madd. p. 508; Serjeant Hill's opinion, Id. 506, n.; Sir Ed. Sugden's observations on the effect of judgments subsequent to such a contract, Vend. & Purch. 8th ed. p. 481; and Lord Dillon v. Plaskett, 2 Bligh, N. S. 239.

⁽ⁱ⁾ Finch v. The Earl of Winchelsea, 1 P. W. 278.

^(k) Taylor v. Wheeler, cited Ibid.; and Burgh v. Francis, Finch's Rep. 28.

contract, are, in practice, considered as liens; of which it is incumbent on him to procure a discharge, by release or satisfaction, for the security of the purchaser, so far as any part of the purchase-money may remain unpaid after the judgment and notice thereof. To adopt the language of Lord Cowper,^(l) "articles made for a valuable consideration, and the money paid, will, in equity, bind the estate, and prevail against any judgment creditor, mesne between the articles and the conveyance; but this must be where the consideration paid is somewhat *adequate* to the thing purchased; for if the money paid is but a *small sum* in respect of the value of the land, this shall not prevail over a mesne judgment creditor."

The application of these principles is well illustrated in the recent case of *Forth v. The Duke of Norfolk*.^(m) There A, being entitled to the reversion of an estate, by indentures of the 27th and 28th of November, 1809, conveyed it in fee, by way of mortgage. On the 1st of January, 1810, B, on behalf of the Duke of Norfolk, entered into a written contract with A for the purchase of the reversion; which was, in pursuance thereof, conveyed to him on the 15th March following, the mortgagee being then paid off, and joining in the conveyance. Part [*586] of the purchase-money remained unpaid, and was secured to A by a separate term created by the deed of conveyance. The plaintiff was a judgment creditor of A, under a bond and warrant of attorney, dated the 16th of November, 1809, which was entered up and docketed on the 15th of February, 1810. On the 15th of April following, notice was given by the plaintiff of his judgment, that part of the purchase-money secured by the term being still unpaid. The purchaser afterwards paid off the mortgage, and took a surrender of the term. The plaintiff then filed his bill to charge the defendant with his debt; and, upon the facts of the case, there appear to have been two questions—First, Whether the judgment creditor had any lien upon the term in the hands of the Duke of Norfolk, as the assignee of it?—Second, If not, whether he had a general lien upon the debtor's equitable interest in the reversion at the time of the conveyance to the Duke of Norfolk; and if so, whether he retained that lien upon the estate in the hands of the Duke of Norfolk? Sir J. Leach, in his judgment, considering the second point first, thus expresses himself—"A judgment creditor has, at law, by the statute of frauds, execution against the equitable freehold estate of the debtor in the hands of his trustee, provided the debtor has the whole beneficial interest; but if he has left a partial interest only in his equitable freehold estate, the judgment creditor has no execution at law, though he may come into a Court of equity *and claim there the same satisfaction out [*587] of the equitable interest as he would be entitled to at law, if it were legal. Every voluntary assignee of this equitable interest of the debtor will be in the same situation, with respect to the claim of the judgment creditor, as the debtor himself was. Every assignee, for valuable consideration will hold this equitable interest discharged of the claim of the judgment creditor, unless he has notice of it before his consideration paid. If, before the 15th of March, 1810, B, or the Duke of Norfolk, had received notice from the plaintiff of his judgment of the 15th of February, 1810, B, being then a purchaser of an equitable interest in a

(l) 1 P. W. 263.

(m) 4 Madd. 503.

freehold estate from the debtor, and not having paid his purchase-money, would have been equally affected with the judgment debt as the debtor himself. If he had afterwards paid the whole purchase-money to the debtor, he would still have remained liable to the judgment creditor."

His Honour held, therefore, in substance, that the purchaser of a debtor's partial equitable interest without notice of a judgment debt was not affected by it. He thus disposes of the first question: "On the 15th March, 1810, B took a conveyance of the legal fee from the mortgagee and the debtor, and thereupon paid a very large proportion of the purchase-money; and by way of security for the rest, granted a legal term of years to the debtor. When, on the 15th April, 1810, the plaintiff gave

[*588] notice of his judgment to B, the debtor had not only no legal *freehold which the judgment would affect at law, but he had no equitable freehold interest which could be reached in equity. That equitable freehold which he possessed before the 15th March, 1810, was on that day converted into a legal term. The plaintiff's notice to B was nothing more than notice to the mortgagor that a person, to whom he had granted a legal term by way of mortgage, was indebted on judgment; but a judgment is at law no lien upon a legal term; and where the interest of the debtor is legal, a judgment is no lien in equity. Notwithstanding this judgment, the debtor could well assign his legal term at his pleasure; and he has therefore well assigned it to the defendant. If there was no lien upon the term in the hands of the debtor, there can be no lien upon the term in the hands of his assignee."

The first part of this judgment turns simply on the principle, that a purchaser without notice of an interest, which the judgment creditor could only reach through a Court of equity, will hold discharged from it; the latter part, upon the principle that a judgment creditor has no lien upon a term till execution issues; and that when the interest upon which a judgment attaches is legal, the creditor must pursue his remedy at law, and cannot come into equity. Bearing in mind these considerations, this judgment is remarkably clear, and affords an admirable illustration of the sort of reasoning with which questions of this kind ought to be treated.

[*589] With reference to these last remarks, the late case *of Causton v. Macklew,⁽ⁿ⁾ which ought to have been stated earlier, may be mentioned here. There A purchased and took an assignment of a house for the residue of a term on the 27th September, 1769; on the 23rd May following he made a mortgage of it. In May, 1825, a contract was entered into for the sale of the residue of the term. On investigating the title, it was found that various judgments had been entered up against A in the year 1768, 1769, 1770. And on behalf of the purchaser, it was objected that there was no evidence of these judgments having been satisfied. To estimate the weight of this objection, it will be necessary to bear in mind the two principles which have just been stated with respect to the operation of judgments on terms: that is to say, that a judgment creates no specific lien on a term of years, till the writ of execution is lodged in the hands of the sheriff; and that an equitable interest in a term of years cannot be taken in execution by the sheriff, at the suit of a judgment creditor. Consequently, as in this case A parted by his mortgage with the legal estate on the 23rd May follow-

(n) 2 Sim. 242.

ing the September when he became possessed of it, unless writs of execution of any of the judgments were lodged in the sheriff's hands in this interval, the leasehold property in question would not be affected by them. The interval of time since the judgments were issued was nearly sixty years, and there was no evidence whatever to show that the creditors *had ever acted upon these judgments. After so long [*590] an interval, and in the absence of all evidence, it would have been a very strong thing to presume the existence of judgments; and accordingly the Vice-Chancellor overruled the objection.

When a title is defective on the ground of possible claims or incumbrances, which may or may not spring up at some future period, the vendor cannot in general compel the purchaser to accept, nor can the purchaser compel the vendor to give, an indemnity against them. Lord Eldon, in *Paton v. Brebner*,^(o) observes, "that, in a suit for the specific

(o) 1 Bligh, O. S. 67. This was an appeal from an order of the Lord Ordinary, in an action for the implement of certain feu contracts, or agreements for sale and purchase, a proceeding in substance (allowing for the dissimilarities between English and Scotch proceedings) in the nature of a suit for the specific performance of a contract. Lord Eldon follows up the observation in the text with some remarks, which appear not to be quite correct,— "In a case like the present, where no title can be made, it is the practice, I presume, of the Court of Session to direct (as they seem to have done in this case,) that the vendor shall make a title as far as he can; and for all that is defective—for all such parts of the contract as he cannot specifically perform—they compel him to enter into a warrandice, and render himself liable in damages. The question has been argued at the bar, and is discussed in the printed papers before the House, whether that is the course which the Court of Session ought to have taken? In the view which I take of the case, it is not necessary to decide that question."

That Lord Eldon was under a misapprehension as to the practice of the Lords of Session on matters of title, will be sufficiently obvious from the authorities cited in *Dick v. Donald*, 1 Bligh, N. S. 687. That their practice in matters of title does not differ essentially from that adopted in our Courts of Equity, will appear pretty plainly from the explanation given of it in Mr. Bell's *Principles of the Law of Scotland*, and though not of much practical use to an English lawyer, yet it can hardly fail to be interesting, as showing how naturally all tribunals, notwithstanding the differences that prevail in their systems of procedure, fall into the same current of general principle in matters of mere right.

I. *Evidence of Bargain*.—The contract of sale absolutely requires writing, where the subject is land or its pertinents, and there is generally a previous obligation in writing, to fix the bargain, while the necessary examination of titles and preparation of the formal conveyances are proceeding. This is in the form of missives or minutes of sale, to which the doctrines already explained, as to authentication, *locus penitentis*, *rei interventus*, and homologation, are applicable.

II. *Seller's Title*.—There are two obligations implied in the sale of lands, one to give an unexceptionable title, the other to warrant or indemnify the seller in case of eviction. As to the former, it is implied in a sale of lands, although it is commonly expressed in the previous minutes or agreement, that the seller shall give an unexceptionable title. And here the difference may be observed between the obligation in a sale of moveables, and in a sale of land. The rules on this subject with regard to lands are—

1. That the buyer has an absolute right to a good title, and, unless he have unequivocally discharged this right, he is not bound to take a defective title with warrandice, or wait till his right is challenged.

2. That it is a sufficient ground of exception to the title, if it be exposed to question; and although, at one time, it seems to have been held sufficient to offer a progress, against which no challenge had been made, with warrandice in case of challenge; this is not law, and has been uniformly rejected in subsequent cases.

3. That the buyer must either take the title offered, or give up the bargain; but is not entitled to insist on a deduction from the price.

- [*591] *performance of a contract, if it turns out that the defendant cannot make a title to that which he has agreed to convey,
 [*592] *the Court will not compel him to convey something less, with indemnity against the risk of eviction. The purchaser *is left to seek his remedy at law, in damages for the breach of the agreement. Conformably with this, in the
 [*593]

4. That if it be specially and clearly agreed that the title shall be taken as it stands, or that the buyer shall be held to have examined the title and satisfied himself; all that is demandable in absence of an actual challenge is warrandice.

5. That while such objections do exist, the buyer is not bound to pay the price. And, accordingly, a known method of trying the validity of objections to titles is, by suspension of a threatened challenge for payment of the price.

III. *Burdens and Incumbrances.*—The title may be unexceptionable, but the land burdened with incumbrances, which, of course, the seller is bound to discharge. And,

1. The burdens by real security remain as incumbrances on the land, and so effectual against the purchaser, although extending beyond the price which he has agreed to pay; so that a receipt from the creditors in such burdens, with a discharge of the price by the seller, will not disencumber the land.

2. In judicial sales, and in sales under the Sequestration Act, the burden is limited to the amount of the price. And, 1. Payment of the price to creditors, as ranked in judicial sale, disburdens the land. And, 2. In sequestration, payment of real securities to the amount of the price, with a discharge by the trustee, completely disincumbers the land.

3. The purchaser is entitled to retain the price till incumbrances shall be purged. But, 1. This is subject to equitable limitation. 2. It may be renounced by limiting the right of retention to a certain number of years. Or, 3. If the years of prescription have expired, and warrandice be given with caution to relieve, the Court will interpose.

IV. *Extent of the Right.*—The seller is bound to convey and deliver the whole subject sold. And,

1. The purchaser is entitled to every thing included in the description, but not to demand any thing which it excludes.

2. A description by measurement entitles the purchaser to insist for the quantity described.

3. If the description is stated to include a freehold qualification, as a part of the subject relied on by the buyer, he may suspend payment of the price, or refuse the bargain unless he receive it. But it is not enough to raise this plea, that the subject sold is a superiority of forty shillings of old extent, if there be no warrandice of a vote.

V. *Warrandice in Sales of Land.*—Keeping in view the double obligation incumbent on a seller of land, and the buyer's right to insist for a complete title, if a sale of land has been completed by the execution of those deeds by which the property is transferred, there is still implied (and commonly expressed in the conveyance) an obligation of warrandice to indemnify the purchaser in case of eviction. This is absolute in sales where a full price is paid, unless a limitation has been stipulated.

The obligation may be personal or real.

1. Personal warrandice is a mere obligation, express or implied, to indemnify the purchaser against eviction.

2. Real warrandice is also either express or implied—1. Express, where one heritable subject is conveyed to the purchaser of another in security and real warrandice against eviction of that other; in which case the security is completed by sasine in the warrandice lands, and the right so created is merely provisional. 2. Implied, where land owners make exchange or exambion of their lands with each other; in which case the person who shall, by eviction, lose the subject conveyed to him, may have recourse upon his original property; but it is doubtful whether, without being specified in the sasine, this right is effectual against third parties.

Warrandice is not an obligation to *protect*, but only to *indemnify* in case of eviction; and out of this peculiarity (too often overlooked,) arise several important consequences. Thus,

1. There is no action of warrandice till judicial eviction, unless the ground of demand be unquestionable, and proceeding from the fault of the seller.

2. Indemnification must be made for a partial eviction.

3. A burden must be removed; but if transacted by the buyer, he can demand only indemnification.

*case of *Balmanno v. Lumley*, (p) on a motion for reference [*594] to the Master, which the Court ordered, counsel for the purchaser being desirous of adding to the order a direction, in case the report should be against the title, for an inquiry as to compensation and indemnity, suggesting that, as to part of the estate, indemnity might be more convenient than compensation: the inquiry as to compensation was consented to on the behalf of the vendor; but, as to the indemnity, this was objected to, as being inconvenient to families; and it was insisted that the purchaser must either take the estate with an allowance for a defect, or reject it. Lord Eldon said, "he did not apprehend the Court could compel a purchaser to take, or the vendor to give, an indemnity, and accordingly confined the order to compensation."

It is now settled that quit-rents and rent-charges are subjects of compensation, and that, though not noticed in the particulars of sale, a purchaser will be *compelled to complete, with an allowance [*595] out of the purchase-money for them. "Quit-rents," says Sir J. Leach, in *Esdale v. Stephenson*, (q) "are subjects of compensation, probably because they may be regarded as incidents of tenure. Rent-charges are not incidents of tenure, but are created by the voluntary act of the vendor, or those under whom he claims. And it would be a good rule that a purchaser should not be bound to complete his purchase unless they were noticed in the agreement or conditions of sale. I fear that the habit of the Court has been not to proceed upon this distinction between quit-rents and rent-charges, but to compel the purchaser to complete where the rent-charge is small." (r)

(5) *When defective from Vendor's Inability to give the Purchaser a good Discharge for his Money.*

Where an estate is sold by a person in right of his ownership, the purchaser takes from him a receipt for the purchase-money, and is, of course, freed from all further obligation in respect to it; but where the sale is by a party acting under a trust or power to sell, the purchase-money belonging not to the vendor but to other persons, for whom he receives it as trustee, there are a variety of cases in which, if it happen that the purchase-money should not, owing to breach of trust or other cause, ultimately come to the hands of the *cestuis que trust*, the land would still *remain liable for the money in the hands of the [*596] purchaser. The consequence is, that in such cases the purchaser cannot safely pay his money on the receipt of the trustee; but is

4. The purchaser is entitled to demand the whole worth of the subject at the time of eviction, with meliorations, and not merely the sum which he has paid.

5. The person bound in warranty is entitled to have notice of the claim or attempt to evict, and if the buyer undertake the defence without such notice, and shall omit the proper answer to the claim of eviction, the seller shall be free.

6. The seller is not bound to defend against the claim; and if the buyer choose to do so, while the seller declines it, he is not entitled to the expense of litigation.

7. Warranty indemnifies only against loss from defective right, and from losses properly anterior to the sale, but not from losses caused by supervenient laws, or arising from the nature or legal effects of ownership. To protect against these, requires a special stipulation.

(p) 1. Ves. & Bea. 224.

(q) 1 Sim. & Stu. 124.

(r) And see *Milligan v. Cooke*, 16 Ves. 1.

bound, at the risk of having it to pay over again, to see it applied in fulfilment of the trusts to which it is liable. In all cases of this sort, therefore, if the *cestuis que trust* of the purchase-money be infants, or for any other cause unable or unwilling to join in the conveyance to the purchaser, and give proper discharges for the purchase-money, the title is unmarketable; if the *cestuis que trust* of the purchase-money are competent and willing to join, the title is, of course, as far as respects this matter, good.

On the same grounds, if in any of the transmissions of the estate which appear on the abstract, monies appear to have been paid to trustees who had no authority to grant a good discharge, whether they be monies secured on the estate by mortgage, or monies paid for it on a sale, the title, in the absence of evidence showing that the monies in question were duly applied, will be unmarketable. (s)

Hence, therefore, it becomes important to consider, in what cases the purchaser is bound to see to the application of his money; and in considering them we shall find it convenient to divide the subject into two branches, *first*, as to real estates (I.), and *secondly*, as to chattels real (II.); the principles which govern these two classes of cases being essentially different.

[*597] *I. In equity, the party beneficially entitled to the produce of the estate, that is to say, the *cestui que trust* of the purchase-money, and not the trustee or donee of the power of sale, is considered to be the owner; and on this principle it is that the purchaser is bound, at the hazard of having his money to pay over again, to pay it to the *cestui que trust*, or see that it comes to his hands, or, in other words, to see to its application. Thus, if the estate be devised or conveyed to trustees, upon trust to sell and invest the produce, and pay the interest and dividends to A for life, and after his death among his children, as he shall appoint, or equally, &c., as the case may be: A and his children are in equity considered as the owners of the estate. So, if an estate be charged with the payment of annuities, or legacies, or specified, or, as they are commonly called, scheduled debts, the annuitants, legatees, and scheduled creditors, are to be considered as being *pro tanto* the owners of the estate; and if the purchaser pay over his money to the trustees upon their receipt, without seeing it applied in liquidation of these particular charges, or otherwise seeing that they are satisfied, he will be liable to pay his money over again, to the extent of the unsatisfied charges, in case the trustee should waste or misapply the purchase-money.

In all properly drawn deeds or wills, creating trusts of this description, there is a clause enabling the trustee to give the purchaser a good receipt, and expressly discharging him from seeing to the application of the purchase-money. Whenever there is such a clause, the purchaser is exonerated from all question on the subject.

There are certain cases where, even in the absence of this clause, he may pay his money safely upon the receipt of the trustee—the distinction being between cases where the trusts are specific and limited, and where they are general and undefined. In the former case, a purchaser

must see to their performance; in the latter, he is freed from such obligation, on the ground that it would be unreasonable to impose such a task upon him.

Hence, therefore, if an estate be charged with the payment of specific sums of money to particular individuals, a purchaser must see that they are paid; but if there be a devise or conveyance to trustees, to sell and apply the money upon trusts of an undefined nature, as the payment of general debts, a purchaser is not bound to see to the application of his money.^(t) Hence, if the trust be for payment of debts and legacies, the trust to pay the debts intercepts the trust to pay the legacies; for, as he is not bound to see to the payment of the former, he cannot be expected to see to the payment of the latter, which are not payable till the former have been discharged. Thus, in *Jebb v. Abbott*,^(u) Lord Chancellor Thurlow said, "that, where debts and legacies are charged upon lands, the purchaser will hold free from the *claims of the legatees; for, not being bound to see to the discharge of [*599] debts, he cannot be expected to see to the discharge of legacies, which cannot be paid till after the debts." So, in *Beynon v. Gollins*,^(v) the testator had charged his estate with the payment of his just debts generally, and with a legacy of £800 for his daughter for life, and after her death for her children. The trustees had joined in a conveyance of part of the estate to a purchaser, and permitted the £800 to come into the hands of the daughter's husband, and it was wasted. The bill was brought by the wife and children, to have the legacy made good by the purchasers of the estate, and against the trustees. It was dismissed as against the purchasers. Upon further directions, it was pressed by Mr. Ambler, that the trustees should pay the costs of the purchasers; but Lord Thurlow refused this, saying, "that, as there was a general charge of debts, the purchasers were not liable to see to the application of the purchase-money in payment of the £800; and that, if the plaintiff thought fit to make unnecessary parties, the trustees ought not to pay the costs of such parties, but that they must receive them from the plaintiff."

It has been already seen, that, when the trusts are general and unlimited, the purchaser is not bound to see to the application of his money. There are other cases in which he will be discharged, although there may be no clause expressly exempting *him from such obligation; the nature of the trust may be such, that a power to [*600] give a good discharge must be implied. Thus, in *Sowarsby v. Lacy*,^(w) A devised certain real estate to his children "the same to be sold when the executors and trustees of this my last will shall see proper to dispose of it; and the money arising out of the said land and tenements to be equally and severally divided among my above-mentioned children." The lands were sold by auction, and it was objected, on behalf of the purchaser, that the plaintiffs, the trustees and executors, had no power under the will to sell; and that they could not give sufficient receipts

(t) *Elliott v. Merryman*, Barnard, Ch. Rep. 78; *Spalding v. Shalmer*, 1 Vern. 301; *Culpepper v. Aston*, 2 Ch. Ca. 115, 221; *Smith v. Guyon*, 1 Ch. Ca. 186.

(u) *Butler's Co. Litt.* 290. b. n. (1), s. 12.

(v) *Butler's Co. Litt.* 290. b. n. (1), s. 11.

(w) 4 Madd. 142.

for the purchase-money, at least for such parts of the purchased estate as would belong to the infant children of the testator. With respect to the first objection, Sir J. Leach, however, held it plain, that the testator intended the trustees should have an immediate power of sale; with respect to the second, he proceeded thus—"Some of the children were infants, and not capable of signing receipts. I must, therefore, infer that the testator meant to give to the trustees the power to sign receipts, being an authority necessary for the execution of his declared purpose."

The same judge has, in a variety of subsequent cases, acted on similar principles. Thus, in *Wood v. Harman*,^(x) a testator, by his will, had

[*601] "authorized his executors to convert all his real and personal estate into money, and lend the same upon good security." It was held—"That the authority to lay out and invest the money was an authority to do all acts essential to that trust, and, necessarily, therefore, to give sufficient discharges." So, in *Lavender v. Stanton*,^(y) where the trustees were directed to sell, and to apply the purchase-money for the benefit of children during their minorities, the same judge held—"That the power of giving a discharge to the purchaser was necessarily to be implied; because the children were incapable of joining in the receipts, and the power of sale would otherwise be nugatory." So, in *Breedon v. Breedon*,^(z) the testator, after making certain provisions for his aged horses, proceeded thus:—"I also give and bequeath to the said A and B the farm called Flowers, with permission for them to dispose of the said farm to my son C, or the next person in

[*602] possession *of the manor of Pangbourn, if they think proper to do so; but advise them to be very cautious and circumspect in this matter, and to make due provision for the fulfilment of the above condition respecting the aged horses by the purchaser of the said property; and in case my son, or the next person in possession of the said manor, should not agree to purchase the same; and my said sons A and B should wish to let the same farm, they may do so, subject to the same restrictions; and, if the said farm should not be sold, I bequeath the same, after the decease of either of my said sons, to the survivor; and after the decease of both, to be sold by auction, and the purchase-money thereof to be equally shared between the children of the said A and B; and if they, or neither of them, shall not have left any child or children, then to be shared equally between the daughters of, &c." The testator's sons, A and B, entered into a contract with their brother, C, for the sale to him of the farm in question, subject to the condition as to keeping the aged horses; and the bill was filed by them for the specific performance of this contract. One question was, whether A and B could give a sufficient discharge for the purchase-money; and the

(x) 5 Madd. 358. And see also *Warnesford v. Thompson*, 3 Ves. 513, where the sale was by executors, in execution of a power of sale, supposed to be given by an obscurely and ignorantly framed will; and, notwithstanding the opinion of an eminent conveyancer, that it would be very unsafe for a purchaser to rely on the power of sale, Lord Loughborough, being "clearly of opinion that there was a power to sell," over-ruled the Master's report against the title, and ordered the contract to be performed. From the report, which is very concise, it does not appear whether any question was made as to the power of the executors to give a good discharge for the purchase-money. It seems, indeed, to have been tacitly assumed, that, if it could be clearly collected from the will that a power of sale was given to the executors, a power to give a valid receipt followed of course.

(y) 6 Madd. 46.

(z) 1 Russ. & Myl. 413.

Master of the Rolls held they could, saying—"The words of the will import an absolute power of sale, if A and B so think fit, to the persons described in the will; and, consequently, A and B are capable of giving an effectual discharge for the purchase-money."

"In *Barker v. The Duke of Devonshire*; (a) a testator devised to A and B all his real and personal estate, upon trust [*603] to sell for such purposes as he should thereafter appoint; and he made them executors of his will. He then directed his debts to be paid by his executors, and, after giving certain specific legacies, devised the residue of his estate to his eldest son, if he attained twenty-one; if not, to which one of his sons should first attain that age. The trustees agreed to sell part of the estate to the Duke of Devonshire for the purpose of raising money to pay debts; who refused to complete, on the ground that the title was defective, alleging that the will did not give the trustees sufficient power to sell for payment of debts, and did not provide that their receipt should be a sufficient discharge to a purchaser. The case seems, by this report, to have been argued as if the only question was—Whether the real estate was charged with the payment of the debts; and, if so, it was admitted that, as the devise was for the payment of debts generally, the trustees could make a good title. It was contended that the direction for payment of debts by the executors, showed that the intention was to confine it to payment out of the personal estate; but this is not the objection taken to the title, nor is it the ground on which the judgment turns. It seems clear enough that a power of sale, over-reaching both real and personal estate, was given to the executors and *devisees in trust; and equally clear, that the produce was to [*604] be applied in payment of debts; there was, therefore, undoubtedly, a trust for sale created for the payment of debts, and the only question was, whether it was necessarily incident to such a purpose, that the trustee should have power to give a good discharge. The judgment is very concise, Sir William Grant merely saying—"In a late case of the same kind, (b) I held that such a direction authorized a sale for the payment of debts; and I continue of the same opinion. Consequently, a specific performance must be decreed." The ground of the judgment, probably, was, that unless such an authority was implied, the whole purpose of the trust would have failed.

Where the trust is to raise so much money as the personal estate should be deficient in paying the debts, or debts and legacies, a purchaser is not bound to ascertain the deficiency, nor whether there be any deficiency; since he could not ascertain either of these facts without taking an account of the debts, a duty, which, it has been already seen, the Court will not impose upon a purchaser; nor without ascertaining also the amount of the personal estate, a matter which he has no right nor any authority to inquire into. Where, however, there is not a trust, but a *mere power* to trustees to sell for the purpose of raising so much money as the personal estate should be deficient for paying the debts, or debts and legacies, there, upon the principle *that a mere authority must be strictly [*605] followed, the purchaser is bound to ascertain—First, that there is actually a deficiency, for otherwise the power does not arise at

(a) 3 Mer. 310.

(b) The case alluded to does not appear to have been reported.

all; and—Secondly, the amount of that deficiency; for, beyond that the power of sale is good for nothing(c)—Thirdly, that the sale is not more extensive than the deficiency, because such a sale would not be within the authority of the power.

It has been seen that, when trusts are defined, the purchaser is bound to see them satisfied, or his purchase-money duly applied in their satisfaction; but that when the trusts are general, he is under no such obligation. It may now be further stated, that even if the trusts be defined, yet, if they be of such a nature as to require time and discretion in the fulfilment of them, as where the trust is to apply the money in the purchase of other estates, then the purchaser is not bound to see to the application of his money. Thus, in *Doran v. Wiltshire*,(d) the premises were settled on the plaintiffs, successively, for life, remainder to their issue, with power for the plaintiffs to sell, with the consent of the trustees; the trustees to receive the purchase-money and to lay it out again in lands to the uses of the settlement; and, till that was done, to invest it in government funds. It was objected to the title, that there was no clause in the settlement declaring that the receipt of the trustees should be a good discharge; *606] upon which Lord Thurlow held—"That, as to the power which the trustees have of giving a discharge, it is true, that when land is to be sold, and a particular debt is to be paid with it, the purchaser is bound to see to the application of the purchase-money. But in cases where the application is to a payment of debts generally, or to a general laying out of the money, he knew of no case which lays down, or any reasoning in any case which goes the length of saying, that a purchaser is so bound; and therefore he conceived that the receipt of the trustees would be a good discharge in this case."

And on this principle, perhaps, is to be explained the practice of conveyancers, where the trust is to sell and invest the produce upon trusts, not to impose on the purchaser the obligation of doing more than to see to the actual investment of the purchase-money and to take from the trustees a declaration of trusts; "it not being possible," (to adopt the language of Mr. Booth in an opinion on a question of this kind,) "that the testator should expect from a purchaser any further degree of care and circumspection, than during the time the transaction of the purchase-money was carrying on, and therefore the testator must be supposed to place his whole confidence in the trustees:" and this, he added, "was the settled practice; and he had often advised so much and no more to be done; and particularly in the case of the trusts under the Duchess of Marlborough's will."(e)

[*607] *So, on the other hand, when the deed confers an immediate power of sale for a purpose which cannot be immediately defined, as to pay debts which cannot be ascertained till a future and distant period, then the receipt of the trustee will be a good discharge. On this principle Sir W. Grant decided *Balfour v. Welland*.(f) The question arose upon a conveyance to trustees in trust to pay such creditors as should come in and execute the deed within eighteen months after its execution, unless under disability, in which case the same period

(c) *Dike v. Ricks*, Cro. Car. 335, and see *Culpepper v. Ashton*, 2 Ch. Ca. 221, though the case did not call for an express decision of the point. See also 2 Ch. Ca. 115.

(d) 3 Swanst. 699.

(e) Cas. & Op. 2 vol. 114.

(f) 16 Ves. 151.

was to be allowed after the disability ceased. It was objected to the title on behalf of a purchaser under this trust, that the trustees could not give a good discharge for the purchase-money. Sir W. Grant, after laying down in substance the principle already stated, proceeds thus:—
 “It is impossible to contend that the trustees might not have sold the whole property at any time they thought fit after the execution of the deed; and yet it could not be ascertained, until the end of eighteen months, who were the persons among whom the produce of the sale was to be distributed. If the sale might take place at a time when the distribution could not possibly be made, it must have been intended that the trustees should, of themselves, be able to give a discharge for the produce; for the money could not be paid to any other person than the trustees. It is not material that the objects of the trust
 *may have been actually ascertained before the sale. The [*608]
 deed must receive its construction as from the moment of its execution. According to the frame of the deed, the purchasers were or were not liable to see to the application of the money, and their liability cannot depend upon any subsequent event.”

Sir W. Grant seems also to have thought, from the nature of the transaction, that it was to be inferred that the creditors had placed their entire confidence in the trustees, and that they must have intended that the trustees should have the power of giving a good discharge. “There is another ground upon which I think the purchaser must necessarily be safe in paying the price to the trustees, in this particular case. No creditors have any interest in this trust, except those who shall have executed the deed. It is evident, from the whole tenor of the deed, that they contemplated and intended that all the money to be produced by the sale of every part of the property should come into the hands of the trustees; should be managed by them until distribution; should be placed out in their names; and should by them be ultimately distributed. Then the trustees were as much appointed by the creditors to receive the money, as by the debtor to sell the estate. How can those creditors ever complain, that the money was paid to the very persons appointed by them to receive it? It seems to me very clear, that the trustees were fully authorized to give a valid receipt for the purchase-money; and consequently this title is unexceptionable.”

*Where there is a conveyance to A. and B, upon trust to sell, with a direction that the receipts of A and B shall be a [*609] sufficient discharge, there, on the principle that a trust cannot be imposed upon any one against his will, if A refuse to act, and actually renounce or disclaim, without having done any act under the trust, the receipt of B alone will be sufficient. Thus, in *Adams v. Taunton*, (g) estates were devised to two trustees in trust to sell; and it was declared that their receipts should be a sufficient discharge to the purchasers. Shortly after the death of the testator, one of them, by deed poll, reciting, among other things, that he was desirous of renouncing the trusts, did thereby wholly and absolutely renounce and disclaim the estate so vested in him. The will was proved by the other trustee alone. On a suit for specific performance of a contract for sale of part of the estate, it was insisted that both the trustees ought to join in the conveyance

and receipt for the purchase-money. But Sir J. Leach, on examining the authorities, said—"It being now clearly settled, that a devise to A, B, and C, upon trust, is a good devise to such of the three as accept the trust,—it follows by necessary consequence, that, by the receipt of the trustees is to be intended the receipt of those who accept the trust," and accordingly decreed 'specific performance; but without costs, probably in consequence of the decision in the case of *Crewe v. Dicken*,^(h) [*610] in which, under *similar circumstances, one of the trustees being unwilling to act, instead of renouncing or disclaiming, conveyed to his co-trustee, by lease and release. It was objected by a purchaser, that he ought to join, because the conveyance by lease and release implied that he had something to convey, which could only be by his having accepted the trust. A bill was filed by the other trustee for specific performance, upon which Lord Loughborough held the objection to be valid. "I do not feel," said his Lordship, "how it is possible to help the plaintiff. If he had renounced, as in the case that has been put, he might dissent where no estate passes. The whole estate would have been in the plaintiff, exactly as if the two other trustees had died in the life of the testator. He would have been the only person. But according to the way they have managed it, he has accepted the trust and conveyed away the estate. That part of the trust that consists in the application of the money he could not convey away. The hazard probably is not great: but I do not know how to make the purchaser run the hazard. Taking the title with knowledge of the trust, he would be bound to see to the application of the money. I do not feel that I can make the purchaser pass over this objection."

The same objection was taken, under similar circumstances, in *Nicloson v. Wordsworth*;⁽ⁱ⁾ but there, the bill being filed by the purchaser, [*611] who was *in possession, for specific performance, and for an injunction to restrain the defendants from proceeding in their action of ejectment, Lord Eldon held, that, according to the frame of the record, the question raised by the objection could not be decided. "If," said his Lordship, "the suit had been instituted by the defendants against the plaintiff, the Court must have decided the question, whether the defendants could make a good title? But is the form of the record such, that any judgment can now be pronounced? The plaintiff has filed the bill for specific performance, himself insisting that his vendors cannot make a good title. I can say only, that if he does not choose to take the title which they can give, he can have no decree. To raise the question properly on the record, the defendants should have been plaintiffs. The injunction must of necessity be dissolved, if the plaintiff will not accept the title of the defendants. Where, on a bill by a vendee for specific performance, it appears that the defendants cannot make a good title, there is no further question in the cause than who is to pay the costs. If the plaintiff insists that the title is not good, he cannot resist the ejectment of those who were previously in possession of the land. Rejecting the title, he must relinquish possession."

His Lordship appears to have disapproved of the decision in *Crewe v. Dicken*, and to have thought, that where the clear intention of a trustee was to disclaim the trust estate, a conveyance by lease and release ought

(A) 4 Ves. 97.

(i) 2 Swanst. 365.

to have that effect. After adverting to *the authority for the proposition, (k) 'that if an estate is conveyed to two persons in trust, and one will not act as trustee, the estate vests in the other,' he proceeds thus:—"If, therefore, the party executes a simple instrument, and under his hand and seal declares that he disclaims, that is, dissents from being a trustee, the fact must be taken to be that he is no trustee; but in *Crewe v. Dicken* the difficulty occurred, that, instead of doing this, the party conveyed his estate to the other trustees. Lord Loughborough thought that that was different from a mere disclaimer; because he could not execute a release without having assented to the conveyance to himself. In that case there were also specialities; the individuals were particularly described, and the directions for the form of the receipt were such as to make it impossible that a proper receipt could be given, unless the trustee who had disclaimed joined. If the essence of the act is disclaimer, and if the point were *res integra*, I should be inclined to say, that if the mere fact of disclaimer is to remove all the difficulties, and vest the estate in the other trustees, a party who releases, and thereby declares that he will not take as trustee, gives the best evidence that he will not take as trustee. The answer, that the release amounts to more than a disclaimer, is much more technical than any reasoning that deserves to prevail in a Court of equity. If the contract were mine, and I approved the bargain, I should abide by it; but that opinion will not assist the party."

*On the following day he again resumes the question, [*613] whether the release could be considered as a mere disclaimer, adding—"If so, then, on the authority of Lord Hale(l) and subsequent cases, though I do not understand the principle, I might have held that the other two trustees could make a good title; but a release, referring to an interest which the releasor supposes he has in him, introduces the doubt in *Crewe v. Dicken*. A release is the instrument of a person who thinks he has something to part with; it is not a mere dissent or refusal to concur. I argued the case of *Crewe v. Dicken* on various grounds, and I recollect that the words relative to the receipt were very special. The more one examines the distinction between disclaimer and release, the less one sees the worth of it. My opinion is, that if a person, who is appointed co-trustee by any instrument, executes no other act than a conveyance to his co-trustees, where the meaning and intent of that conveyance is disclaimer, the distinction is not sufficiently broad for the Court to act upon. What is the thing called a disclaimer? I have seen some prepared by the ablest conveyancers, in a form like this:—"I hereby declare that I have disagreed, and hereby disagree, &c., and hereby disclaim, &c." What is the effect of that? That is sufficient. I can find no case which has decided, nor can I see any reason for deciding, that where the intent of the release is disclaimer, the inference that the releasor has accepted the estate shall prevent the effect of it. I *think there is no case in which judgment has been pronounced on the distinction between a disclaimer and a release; and that, where the intention is disclaimer, there ought to be no distinction. I understand the operation of a release with [*614]

(k) *Smith v. Wheeler*, Vent. 128; 2 *Kable*, 772.

(l) *Smith v. Wheeler*, Vent. 128; 2 *Kable*, 772.

intent to disclaim; but it is difficult to know what that thing called a disclaimer is."

Although it must be admitted to be very difficult to find any substantial difference between a disclaimer in the ordinary form, and a lease and release with intent to disclaim; and although it is sufficiently manifest that Lord Eldon thought the distinction too slender to be acted upon, and very probable, that, had he been called upon to decide the question in *Nielson v. Wordsworth*, he would not have acted upon it; yet, in the present state of the authorities, a title involving an objection on this ground must be considered to be unmarketable.

It has frequently been thought, that where there is a hand to receive the money, the purchaser should in no case be obliged to see to the application of it,—in other words, that where a power of sale or investment is given, a power to give a good discharge is necessarily incident to it. This appears to have been the opinion of Lord Kenyon, when Master of the Rolls;^(m) it has been the opinion of many eminent lawyers since that time; and from a recent case of *Hanson v. Beverley*, [*615] which will be presently stated, *as well as from the whole current of his decisions, it is manifestly the opinion of the present Master of the Rolls. This point, however, has never been so decided; and, therefore, every title involving this difficulty must be treated as being unmarketable.

In *Hanson v. Beverley*,⁽ⁿ⁾ the estate in question being, in the month of September, 1823, subject to a mortgage for a term, to secure the sum of 3,000*l.*, and the mortgagee being desirous to have it paid off, the mortgage was transferred to Wm. Bradley, by an indenture of the 27th September, 1823, in which Bradley was described as one of the trustees and executors of the last will and testament of Ed. Earl, late of the Island of Jamaica, Esq., deceased, as to the sum of 10,000*l.*, bequeathed upon the trusts therein mentioned; and there was a covenant to pay the said sum of 3,000*l.*, and interest, to Bradley, his executors, administrators, or assigns. In the month of April, 1826, this mortgage was paid off on the application of Bradley, who shortly after became insolvent, and the money, not having been re-invested was lost. The 3,000*l.* in question was part of the sum of 10,000*l.*, which by Earl's will was given to four trustees, of whom Bradley was one, upon trust that they, or the survivors or survivor of them, should stand possessed of it upon trust, "as soon as conveniently might be after his decease, to place the same in the public funds of Great Britain, or under other good and lawful security; and *the interest arising therefrom to be equally divided yearly and every year between his said brother and sister, for and during the term of their natural lives; and at the death of one of them, the share of interest of him or her so dying to go to his said neice Elizabeth, wife of the said Bradley, for her own sole and separate use; and at the death of both his said brother and sister, he gave and bequeathed the said sum of 10,000*l.* to his said niece to hold the same to her, her heirs and assigns, for ever; and he thereby directed that the shares of interest of the said sum which might come to his sister

(m) See 4 Ves. 99.

(n) Rolls, March 17, 1832, MS.

and niece, should be for their own sole and separate use and uses, free from any control or interference of their present or any future husband or husbands, and that their separate receipts should be full and sufficient vouchers and complete discharges to his trustees for the payment of such interest, and also that the release of his niece alone should be a sufficient discharge to his trustees for the said 10,000*l.*, when she received that sum." At the time of the transfer to Bradley, and paying him off, the plaintiff was not aware of the contents of this will, nor of the fact that there were other trustees living. The will did not contain the usual provision for change of the trust funds, nor a declaration that the trustees' receipts should be a good discharge, and that a purchaser or mortgagee should not be obliged to see to the application of the trust-money. Upon these circumstances, it was objected on the behalf of the purchaser—first, that the 3,000*l.* having been once invested, *there was [*617] no authority to call it in till it became payable to the *cestui que trust*; and, secondly, if there were, that a good title could not be made, without procuring a discharge from the *cestui que trust* of the 3,000*l.*

Upon the hearing of the cause, the present Master of the Rolls expressed himself as follows: "In this case I think I cannot compel the purchaser to take this title; but if it were a question that had come before me in another way, I should entertain very great doubts upon it. No case has been cited to me, nor any principle referred to, which satisfies my mind that the trustee in question could not give a good and effectual discharge as well in equity as at law; but I cannot compel the purchaser himself to be put to the charge of carrying a difficult point like this through every Court to which the case might be referred. It would be unjust to expose the purchaser to such an expense. My opinion is, that the true principle which governs cases of this kind is not as has been argued; but that the true principle is, that no person shall deal with trust-money to the prejudice of the *cestuis que trust*. And we are therefore to inquire whether there has been any dealing here to the *cestuis que trust*? Was it to the prejudice of the *cestuis que trust*, to give an effectual security for this 3,000*l.* as trust money? Did the borrower do any act to the prejudice of the *cestuis que trust*? Was it to the prejudice of the *cestuis que trust*, to restore the 3,000*l.* to the hands of the lender? Is that prejudice? How, therefore, can it be fairly said that any act was done to the prejudice of *the *cestuis que trust*? [*618] If this point was nakedly before me between indifferent persons, I should hesitate very much before I would declare that the party was guilty of a breach of trust; but considering I have no right to impose upon the purchaser the expense of going through the different appellate Courts to which the question might have been carried, I must, I think, upon the authorities, decide that I cannot enforce this contract." The bill was accordingly dismissed with costs, which his Honour gave very reluctantly.

The same view of the subject seems to have been adopted by Sir W. Grant in *Balfour v. Welland*,^(o) where after expressing his opinion that the doctrine imposing on the purchaser the necessity of seeing to the application of the purchase-money had been carried further than any sound

equitable principle would warrant, he adds:—"Where the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the trust of which they have notice; but where the sale is made by the trustee in performance of his duty, it seems extraordinary that he should not be able to do what one should think incidental to the right exercise of his powers: that is, to give a valid discharge for the purchase-money."

II. Where leaseholds are assigned upon trusts, the obligation of the purchaser to see to the due application of the purchase-money in no way differs from the obligation when the subject matter of sale is real estate. When, however, leaseholds are sold by executors in that character, the situation of a purchaser becomes altogether different. Leaseholds in the hands of an executor are assets to be applied by him in a due course of administration; and however bequeathed, are liable in the first instance to the discharge of the general debts of the testator. He stands, therefore, exactly in the situation of a grantee or devisee of real estate upon the trusts for the payment of debts generally; and, consequently, as a purchaser from the latter is not bound to see to the application of his money, so neither is a purchaser from the former.

In addition to this general explanation of the principle, it will only be necessary to state concisely the result of the authorities; which cannot be done more clearly than in the language of Sir J. Leach, in the late case of *Keane v. Roberts*(p)—"With a view to this cause, I have carefully examined every authority upon this subject, and I think the result may be thus stated—Every person who acquires personal assets by a breach of trust or *devastavit* in the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust, by buying, or receiving as a pledge for money advanced to the [*620] *executor at the time, any part of the personal assets, whether specifically given by the will or otherwise, because this sale or pledge is held to be *primâ facie* consistent with the duty of an executor. Generally speaking, he does become a party to the breach of trust by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt, because this sale or pledge is, *primâ facie*, inconsistent with the duty of an executor.

"I preface both these propositions with the term 'generally speaking,' because they both seem to admit of exceptions. Thus a sale or pledge for the private debt of the executor has been supported, under special circumstances, in Lord Hardwicke's two cases of *Nugent v. Gifford*, and *Mead v. Orrery*(q) though not entirely to the satisfaction of every succeeding Judge; and Lord Eldon seems to consider the case of *M'Leod v. Drummond*(r) as an exception to the proposition. It was upon the principles of these propositions, that Sir William Grant proceeded in the case of *M'Leod v. Drummond*; he there supported the pledge of the

(p) 4 Madd. 357.

(q) *Nugent v. Gifford*, 1 Atk. 368, 8, C., 2 Ves. sen. 269; *Mead v. The Earl of Orrery*, 3 Atk. 257. For a more copious statement of the judgments in these two cases, see a note of them, and also of another case of *Langley v. Earl of Oxford*, (a very imperfect statement of which is given in Amb. 17,) in the Appendix, (C,) (D,) (E,) where they are given from Mr. Forrester's MSS.

(r) 14 Ves. 358; on appeal, 17 Ves. 172.

testator's bonds, because they were *deposited in respect of advances made at the time. In the same case of *McLeod v. Drummond*, Lord Eldon, on an appeal, admitted these principles; but, as I have already observed, he seemed to consider the circumstances of that case as forming an exception to the general rule. The advances, though made at the time, were made to two executors, who were partners, as army agents, and were made to them in the course of their business of army agents, and necessarily, therefore, for their private purposes; and he inclined to think, that the bankers were, for that reason, as much parties to the breach of trust, as if they had applied the money to pay the private debt of the executors. I cannot but lean strongly to Lord Eldon's view of that case:—If a party dealing with an executor for the personal assets, pays his money to the executor, so that it may be applied to the purpose of the will, he is not responsible for the executor's misapplication of it; but if, in dealing with the executor, he does in truth pay his money for the private purposes of the executor, he is equally a party to the breach of trust, whether he applies his money to the private debt of the executor, or to the private trade of the executor.” [*621]

(6) *Title unmarketable in respect of the Vendor's Inability to deliver to the Purchaser the proper Muniments of his Title.*

A purchaser, in the absence of express agreement, is entitled to have the title deeds, or a legal covenant for the production of them; if this right be not *complied with, he cannot be compelled to accept the estate. [*622]

In the cases where no covenant for the production of deeds can be obtained, or where a covenant is ineffectual, it was formerly supposed that persons interested in them might obtain their production by the assistance of a Court of equity; but since the decision in *Barclay v. Raine*,^(s) the existence of such a right is questionable. If it exist, the title is still unmarketable, without a covenant which can be enforced at law by the purchaser.^(t)

It is not a good objection to a title, that the vendor cannot produce deeds referred to by recital in deeds more than sixty years old, where the loss of the deeds recited throws no reasonable doubt on the title of the vendor. This was decided in *Prosser v. Watts*.^(u) In this case, a conveyance, dated in 1753, and under which there had ever since been undisputed possession, recited certain prior deeds as matter of title. The vendor had not in his possession or power these deeds, or any copies of them, and was unable to give any evidence as to what had become of them. The purchaser objected, that these recitals affected him with constructive notice of the contents of the deeds in question, and that he could not safely complete, without seeing that they confirmed the title. Sir J. Leach overruled the objection. “There is,” *said [*623] his Honour, “no dispute that the recital of a deed is constructive notice of its contents; but to say that a purchaser is not to complete his contract, unless he has the actual inspection of every deed of which he has constructive notice by recital, would lead to a practical in-

(s) 1 Sim. & Stu. 449.

(t) Second Rep. of the Real Property Commissioners, p. 16.

(u) 6 Madd. p. 58.

convenience, which would be manifestly absurd. In some families title deeds are preserved for centuries; and if the earliest of those deeds recites a former instrument made five hundred years since, but now existing, it would be absurd to say that a contract is not to be enforced against a purchaser, because the deed cannot be produced. There must of necessity, therefore, be some practical limit to the operation of this objection; and the true inquiry seems to be, in every case, whether the absence of the deed recited throws any reasonable doubt on the title of the vendor. *Primâ facie*, it is to be presumed that the purchaser in the ancient conveyance had actual inspection of every deed recited, and was satisfied with their contents; and further, it is to be observed, that it is not probable that a vendor would recite deeds which afforded evidence against his title. When there is no circumstance to repel the effect of these general presumptions, and when the title under the conveyance which contains the recital is fortified by sixty years' undisputed possession, I think it a good practical rule to hold, that the loss of a deed recited throws no reasonable doubt upon the title of the vendor, and that the purchaser must complete his purchase."

[*624] If a vendor, having lost his title deeds, agree to *give the purchaser a real security within a given period, if the deeds were not found, equity will enforce the agreement. Thus, in *Walker v. Barnes*,^(v) the vendor having entered into an agreement of this nature, and a considerable period having elapsed after the stipulated time, without any thing being done by the vendor under this agreement, the purchaser filed his bill, praying that the vendor might be decreed to perform the agreement and deliver up the title deeds, or, if they could not be found, then that he might be decreed to give a full and sufficient indemnity, charged upon his real estates, until the same could be found. The defendant admitted the allegations of the bill,—stated his endeavours to recover the deeds,—his readiness to give a full and complete indemnity, but his inability to give a *real* security, he not being seised of sufficient freehold estates for that purpose; and insisted, that *personal* estate of equal value ought to be received; but it was held, that "if a man agree to give a real security for a demand, he may be obliged specifically to perform his contract, though he has no real estate, because he may procure it. It might be different where he agrees to give a security on a particular estate of which he is not the owner, because he may be unable to procure that very estate; but where, as in this case, he agrees to give a real security generally, he has all the world before him, and must therefore purchase an estate, to enable him to *perform his agreement. In the common case of a husband, on marriage, covenanting to settle a real estate of a particular value, on his wife and the issue of the marriage, if the husband has no real estate to settle, he is compellable to procure one."

If, after the contract for the sale of an estate, and before the title has been accepted, the title deeds be destroyed by fire, specific performance will not be decreed, unless the vendor can furnish the purchaser with the means of showing what were the contents of the deeds destroyed, and of proving that such deeds were *duly* executed and delivered; and it seems, that for this purpose the abstracts, although they have been com-

(v) 3 Madd. 247.

pared with the deeds by the purchaser's solicitor, are no evidence of their contents. In the late case of *Bryant v. Busk*,^(w) some of the material title deeds having been destroyed by an accidental fire in the office of the plaintiff's solicitor, after the abstracts had been delivered, and compared with the originals by the purchaser's solicitor, but before the title was approved, the Court would not compel the purchaser to complete. "Every vendor," said Sir J. Copley, M. R., "must necessarily be bound to furnish the purchaser with the means of asserting his title, and defending his possession. The title deeds are the ordinary and primary means for that purpose. If the primary means do not exist, there may be secondary means to the same end. There may be means of proving what were the contents of the deeds, and that the deeds were duly executed and delivered. Assuming that the abstracts here duly and fully proved the contents of the deeds, yet it remains to be proved that such deeds were duly executed and delivered; and the vendor must furnish the purchaser with the means of such proof. And, it being admitted that no such proof can be furnished, the purchaser is entitled to be discharged. With respect to the alleged specialty in this case—that the defendant's solicitor, having before the fire examined the deeds, for the purpose of comparing them with the abstracts, had the opportunity to learn who were the attesting witnesses, and that the defendant must sustain the inconvenience of his negligence in that respect,—it is to be observed, that the purpose of the examination of the deeds by the defendant's solicitor was merely to ascertain whether the contents of the deeds corresponded with the statement in the abstract, and not to learn how the deeds were to be proved by secondary evidence, in case they should be destroyed; which event could not, at that time, be in the contemplation of any party: and, therefore, it cannot be imputed to him as culpable negligence, that he did not inform himself of the names of the attesting witnesses." The bill was, therefore, dismissed with costs. [*626]

It is a good objection to a title, that it was derived from a person who entered as heir under the impression that his ancestor's will was void; and notwithstanding there may be the best reason for believing that the will was void, and has been lost, yet a purchaser will not be compelled to complete, without production of the will, or evidence of its contents. [*627] In *Stevens v. Guppy*,^(x) the bill was filed by the vendor for performance of a contract of sale of lands, part of which was copyhold, which he had purchased from one A. It was alleged by the purchaser, that the father of A. had devised this copyhold by will, and that his will ought to be produced. On the inquiry under the reference to the Master, A. made an affidavit, stating among other things—"That he inherited the property in question from his father, together with other copyhold premises held of the same manor, and was duly admitted in Court to the same, as tenant to the said lord of the manor: That his father had made and signed some paper as and for a will, which was prepared and written by one Isaac Smith, a *fendermaker*, then deceased: That he took the paper in question to the steward of the manor, who told him 'that it was not worth a d—n,' and that he was entitled, as heir-at-law, to all the copyholds his father died possessed of: It was also admitted by the deponent, that he had suffered his sister to occupy part of the

(w) 4 Russ. 1.

(x) 2 Sim. & Stu. 539.

copyholds for her life, agreeably, as he believed, to the intention of the deponent's father, but she had never received any part of the rents of the copyholds comprised in the contract of sale: He was unable to set forth the contents of the will, never having seen it since he took it to the

[*628] Court, where he left "it as being of no use; and the will was never proved in any Court whatever."

It was argued, that notwithstanding this affidavit, the will might afterwards be produced, or proper evidence given of its contents, and the opinion of the steward be shown to be erroneous; and the Vice-Chancellor held, accordingly, that a purchaser could not be compelled to take the title without full proof of the contents of the will.

The recent case of *Minchin v. Nance*, (y) which underwent great consideration, throws still more open the rule as to the purchaser's right to have all the deeds for a period of sixty years. The material facts of the case may be shortly stated thus—the suit was for the specific performance of a contract for the sale of an estate. In 1721, the estate in question was devised to Joseph Eames, subject to a mortgage created by the deviser. The time of the deviser's death did not appear; but, in 1744, Joseph Eames joined in an assignment of the mortgage; in 1753, he paid off part of the mortgage money, and in 1775, he paid the remainder of it. Joseph Eames died in 1763, leaving John, his eldest son, and two other sons, Joseph and Hugh. By a deed, dated in 1775, made between John, the eldest son, of the first part, Joseph and Hugh of the second part, and a trustee for John of the third part. Joseph and Hugh conveyed all that interest in the estate, which they derived under the will of their

[*629] father, Joseph Eames, for the benefit of John "and his heirs, in consideration of the sum of 576*l.*, paid to them by John, in July 1775. Immediately after this conveyance to him, John mortgaged the estate to S. Saunders, for securing the sum of 600*l.*, then advanced by her; and in 1781, he sold his equity of redemption to one Bradley, and, thereupon, John and the mortgagee joined in conveying the estate to Bradley. In 1798, Bradley sold the estate to Croft, and, in 1807, Croft sold the estate to the person under whom the plaintiff claimed.

The will could not be produced, nor any evidence given of its contents, besides the deed of 1775, in which the sons of Joseph Eames were described as devisees, not saying devisees in fee or in tail, or what other interest they took in the estate. On the reference to the Master, it was objected on the part of the purchaser, that under this will the sons of Joseph Eames might not take such interest as would enable them to vest the fee-simple in John, and that there might be now existing tenants in tail, or otherwise, expectant on the expiration of life estates, who were entitled to the estate; and that for this reason, as well as on the general practice of the profession, that a purchaser is entitled to have all the muniments of title for a period of sixty years at least, they ought not in the absence of the will, or of satisfactory evidence of its contents, to be compelled to complete, the title being in fact only a fifty-six years' title.

[*630] The Master took the same view of the question, "and reported against the title. To this report exceptions were taken on behalf of the vendor. The point was argued at great length.

(y) *Nolls*, sittings after Trin. Term, 1831.

Sir J. Leach, in giving judgment, said—"The objection was, that the will of Joseph Eames was not produced, nor any evidence given of its contents, other than the deed of 1775. It must be admitted, the rule is, that unless the title be fortified by possession for sixty years, a purchaser cannot be compelled to take it. Here, it is true, fifty-six years only have elapsed since the conveyance of 1775; but, if the fact be, as the deed of 1775 imports, that the absolute interest passed by the will of Joseph Eames to his three sons, who were parties to that deed, then the possession greatly exceeded the term of sixty years. Whether this was so or not cannot be directly known, the will not being produced. There is an absence of direct proof of the fact, other than the deed of 1775. The question is, whether there be reasonable presumptive evidence of this fact; for it is now too late to say that such a fact is not to be established on reasonable presumptive evidence, and that the mere loss of a deed or will is necessarily a valid objection to the title. In this case the very existence of the deed is some evidence of the will; the subsequent mortgage for 600*l.*, which was immediately made by John, is a strong fact to show that the will, if produced, would not disclose any defect; for, it shows that the mortgagee who advanced it was satisfied with the title; and this being "soon after the death of Joseph, the deviser, [*631] it is reasonable to believe there must have existed means of ascertaining the actual state of the case, either by the actual production of the will, or by evidence of its contents, which was satisfactory. The subsequent sales of the estate, in 1781, 1798, and 1807, are also strong circumstances in support of the presumption in favour of the title.

Since 1781, the possession has been adverse to any latent estate tail, and this is another strong circumstance in favour of the title. For the sake of argument, let it be admitted, that the will has been suppressed because it did not justify the conveyance of 1775. Would not the same motive which led to its suppression have led also to its destruction? and is there the least probability that the will can ever be produced to the prejudice of the purchaser, or that, at this distance of time, any satisfactory evidence can be given of its contents against that deed? Upon the whole, I am of opinion, that, if I were now sitting before a jury, it would be my plain duty to state to them that this case offered that presumption of a good title, which, in some cases, is called fair and reasonable, and in others a moral certainty; and no verdict would satisfy me which did not confirm the title." And accordingly his Honour allowed the exception.

From this decision there was an appeal to the Lord Chancellor; when the point was again very elaborately argued, and the decision of the Master of the Rolls affirmed on the particular circumstances [*632] of the case: Lord Brougham saying—that he found it nowhere laid down, either in the statute or common law, that a purchaser must necessarily have a clear sixty years' title, and that his decision in this case could not form a precedent.

- (7) *As to the Public Records, &c., to which Recourse might be had for Evidence in reference to Questions of ancient Ownership, Boundary, Tenure, Pedigree, &c.*

Under this head it was intended to have gone into some detail on this

subject,—a very important one, as respects many of the most difficult questions that arise in the investigation of title. These pages, however, having extended to a length much beyond what was originally intended, a sufficient space for the discussion of this important subject could not conveniently be allotted here. The omission is the less important, as, for very much of the information which can be had on this subject, Mr. Cooper's valuable work on the Public Records of Great Britain may be very usefully consulted.

SECTION II.

How far the Purchaser's Right to a marketable Title may be qualified by Contract.

The right to a good title is a right not growing out of the agreement between the parties, but given by law; the purchaser is entitled to insist [*693] on having a good title, not because it is stipulated for by the *contract, but because it necessarily results by legal implication from the nature of the transaction. Hence, if a purchaser, having notice that there is a defect of title, goes on with the agreement, he waives the objection. Whether, in such a case, he has or has not waived his right to a good title is simply a question of notice, and the only inquiry is, whether he had or had not notice of the defect, and whether he proceeded in the negotiation after notice, without reserving to himself a right to insist on this objection, notwithstanding his so proceeding.

Owing to the great difficulty, which the modern decisions in equity and the strict practice of conveyancing have thrown in the way of making out a marketable title, it has become a very usual practice to have the title examined previously to offering the estate for sale, with a view to exclude the purchaser, by the conditions, from making objections which the vendor could not remove at all, or could not remove without going to an expense which he does not choose to incur.

Hence has originated the practice of selling with special conditions of sale, (z) by means of which the purchaser is prevented from harrassing the vendor with objections, which are frequently made rather with a view to annoy, and obtain a reduction of the purchase-money, than from any conviction that the security of the title could be affected by them.

[*694] Some doubt was felt at first by the profession, *whether equity could not relieve against conditions of sale framed with a view to exclude the purchaser from a complete investigation of the title; especially if they went so far as virtually to exclude him from all inquiry, and impose on him the obligation of paying his money for an estate to which the vendor had no title. Their validity even to this extent, is now clearly established both at law and in equity.

In *Wilmot v. Wilkinson*, (a) it appeared, that, by a memorandum bearing date the 12th July, 1824, A and B, with the consent of the plaintiff, (with whom they had previously entered into a similar agreement) “agreed to sell to the defendant the next presentation to the living of P

(z) For an ample collection of forms proper for this purpose, see Bythewood and Jarman's *Proc. in Conv.* 7 vol. 353.

(a) 6 Barn and Cres. 506.

which they had purchased of Lord Oxford for 7,500*l.*, to be paid for at Michaelmas next, on having such title *as they have received* from Lord Oxford and Lord Harley, and their trustee, M." The agreement contained some special provisions as to the mode of paying 7000*l.*, part of the purchase-money; but 500*l.*, the residue, was to be paid absolutely to the plaintiff, with A and B's consent. An abstract of the title was delivered, but none of the originals produced except the conveyance from Lord Oxford, Lord Harley and the trustee to A and B; inspection of the other deeds was required from the solicitor of A and B, with which he did not comply, declaring it was not in his power to do so. On an action to recover the 500*l.*, no conveyance *having been [*635] tendered, one question was, whether, under the terms of the agreement, the vendors were under an obligation to show a marketable title. With reference to this point, Lord Tenterden thus expressed himself—"It is contended that the defendants did not exhibit a good title, and did not tender any conveyance. If they did all that their contract required, and more was demanded, that exonerated them from the necessity of taking any further steps. Now I know not what language a man is to use, who intends to sell such a title as he has, and nothing more, if the words of the agreement in question will not limit his undertaking. If a purchaser unwisely bargains to pay for such a title as another has, it is his own fault if his money is placed in hazard by the insufficiency of the title."

So, in *Freame v. Wright*,^(b) which was a suit for the specific performance of a contract for sale under the following circumstances:—The estate had been previously offered for sale, and the purchaser objecting to the title, and it appearing defective, he was relieved from his purchase. The estate was again put up to sale, and the particulars contained (among others) the following condition—"The purchaser shall have an assignment of the bankrupt's interest to one moiety of the estate *under such title as he lately held the same*; an abstract of which may be seen at Messrs. Tomlinsons & Co.'s, Copthall Court; *but the title [*636] deeds and leases are to remain in the possession of the prior of the other half share." The estate was sold for 550*l.* to the defendant, who refused to complete for want of a good title, and brought his action to recover his deposit and expenses, but was restrained, by injunction, till the hearing of the cause, upon the plaintiff's paying the amount of the deposit into Court. Sir John Leach held, that "every person who proposes an estate for sale, without qualification, asserts in fact that it is his to sell, and, consequently, that he has a good title; but a vendor, if he think fit, may stipulate for the sale of an estate with such title only as he happens to have. And the question is, whether these particulars of sale import that the vendors asserted a good title to the estate, or meant only to sell such title as the bankrupt had? The 4th condition of sale clearly shows, that they only meant to sell such title as the bankrupt had; and states that the abstract of title was to be seen, so as to enable any person who wished to bid, to inform himself of the title he would acquire." It had been suggested in argument that the 4th condition was not circulated before the sale, and that it was only then made generally known by the auctioneer; so that the bidders had no opportu-

(b) 4 Mudd. 364.

nity of inspecting the abstract. The Vice-Chancellor observed, that "this was not very probable;" but offered the defendant an inquiry as to that fact, if he wished one. No inquiry was pressed for: and specific performance was decreed, with a reference to the Master, to inquire and [*637] state under what title the bankrupt held *possession; and the Master was to settle a conveyance according to such title, with a reservation of further directions and costs.

It is clearly, therefore, established that a contract for the sale of such title as the vendor has, will be supported both at law and in equity; a state of the law alike convenient in practice, and conformable to the maxim, that a party entering into a contract with his eyes open shall be bound by the terms of it, when clear and unequivocal, however prejudicial they may be in the result; it plainly being no part of the business either of law or equity to rectify contracts which have been fairly entered into, however improvident they may turn out. On the other hand, unless the vendor were allowed to qualify the purchaser's right to a marketable title, a vast portion of the real property of the country would be unsaleable, or, at all events, the owner of real estate could only enter into a contract for the sale of it, with the certain prospect of a long, wearisome, and expensive investigation, which, in many cases, would terminate either in the estate being flung back on his hands with all the discredit and annoyance of a blemished title, or in his being compelled to enter into terms alike unfair, unjust, and oppressive.

Agreements of this sort, however, being in derogation of what may be called the common law right of the purchaser to have a clear title, must be expressed in plain unequivocal language, so that it may be certain that the purchaser could not be under *any mistake as [*638] to the title he was contracting for. Hence, if the language be ambiguous, the purchaser will not be precluded from his right to investigate the title. Thus, in *Dick v. Donald*, (c) a case from Scotland, in which, by the articles of roup, the vendor contracted to execute and deliver a valid irredeemable disposition of the property, and to deliver to the purchaser certain specified instruments, adding, "which are all the title deeds of the property in his (the seller's) custody;" it was held that the title was not thereby restricted to these instruments, Lord Eldon observing—"That he had never heard, that, because the seller provides that he will give to the purchaser only certain specified deeds, the purchaser must take a bad title, or such title as appears upon the deeds."

On the same principle, when the agreement merely states that the purchaser shall not require a title beyond a given period, or shall only be at liberty to require such and such evidence of certain facts, this does not preclude him from showing, if he can, a defect of title previous to such specified period, or that the fact in question has no existence, and on such grounds rejecting the specific performance of the contract. It has been treated as doubtful, "whether such a condition would protect the vendor from liability in regard to a defect known to him." (d) [*639] There is not a shadow of pretence for such a doubt. *The plain meaning of such a condition is, that the vendor has no other evidence, not that he is in possession of evidence which would

(c) 1 Bligh, N. S. 656.

(d) Jarman's Prec. in Conv. 7 vol. 361.

show that he has no title. To conceal an imperfection under which a purchaser might be evicted, is an act of fraud; to suppose that equity would give such a construction to the condition in question as would exclude the purchaser from relief, would be to turn a Court of equity into a Court of fraud; to give to the condition in question any such effect, would be to contravene the grand leading principle of Courts of equity, the prevention of fraud. To adopt a quaint and somewhat peculiar expression of Sir Edward Sugden, "fraud in a Court of equity vitiates every thing, and turns it to a colour," which probably was meant by this learned lawyer for a liberal translation of the *in tenuem evanuit auram* of the Mantuan bard.

According to the principles of our Courts of equity, a purchaser, although objecting to complete, on the ground of an objection to title, raised by himself, and which, apparently, the vendor has no means of remedying, has, nevertheless, a right, in a suit for specific performance, whether instituted by himself or the vendor, to have the title thoroughly investigated before he abandons the contract; thus, in *Knatchbull v. Grueber*,^(e) it being objected, that the title to a small part of the estate called Cole Nash was bad, unless certain inquiries should be satisfactorily answered; and the agent for the vendor *having [*640] failed in obviating these objections, wrote to the purchaser's agent, stating, that he was unable to throw any light upon the title; a consultation was afterwards had between Mr. Butler and Mr. Cooke, who were decidedly of opinion, that "the title to Cole Nash was irretrievably bad, or at least, that it was absolutely bad, unless further inquiries should be made, and the result of those inquiries should turn out favourable." Upon this, one of the plaintiffs caused a letter to be written to the defendant, stating the result of this consultation, and then proceeding thus—"The parties think it would be extremely imprudent, as well as an useless loss of time, to institute any further inquiry, and propose, with a view to the speedy completion of the purchase, that they either indemnify you, or take Cole Nash back at a fair valuation, or relieve you altogether from the purchase." And it ends with recommending "an amicable arrangement between the parties," as "the only course that can be adopted without having recourse to litigation, which the proprietors are equally anxious with yourself to avoid." This letter, which Lord Eldon, in giving judgment on the appeal, characterized as an "extremely proper letter,"^(f) does, undoubtedly, appear to offer a series of very reasonable alternatives, such as, under the circumstances, might have been thought sufficient to preclude the purchaser from further inquiry. But so clearly is this right of the *purchaser regarded in a Court of equity, that Lord Eldon, [*641] although evidently entertaining a strong feeling that the conduct of the purchaser was somewhat harsh, held, that notwithstanding this reasonable proposal, he was entitled to have the inquiries which had been suggested in the abstract completed. "Here, then," said his Lordship, "are three alternatives—but, whatever may be my opinion as an individual, I am bound, as a judge, to say, that, where a man makes a purchase of an estate, to which the vendor represents that he has a good title, in such a case the purchaser has a right to insist that the question,

(e) 3 Mer. 187.

(f) 3 Mer. 137.

whether he have or have not a good title, shall be sifted to the bottom, before he can be called upon to adopt either alternative, and before the vendor can be let off from his original contract. Accordingly, the defendant had a right to say, if he chose—"I will have these inquiries made, before I determine to take the property at all, or in the qualified mode in which you now propose that I shall take it."

To preclude the purchaser from the exercise of this right, a condition is sometimes inserted in particulars of sale, that if a good title cannot be made, the contract shall be void. It appears at one time to have been thought doubtful whether, on such a condition, the contract was to be absolutely void if a title could not be made, or whether it left the purchaser at liberty to accept the title if he pleased. The latter view of [*642] the question was strongly contended for in *Roberts v. Wyatt*, (g) where the point incidentally arose. That was an action by a purchaser to recover the abstract of title, which, pending the completion of the contract, had been returned to the vendor; the defence was, that, the vendor not being able to make a good title, the contract was void; and that depended on the effect to be given to a condition expressed as follows:—"That if the vendors could not deduce a good and marketable title, such as the purchaser or his counsel should approve, or if the purchaser should not pay the purchase-money on the appointed day, the agreement should be utterly void, it being the intention of the parties that no action or suit in equity should be brought against them." Lord C. J. Mansfield said—"The meaning is, that, if the seller cannot make a good title by the time mentioned, the contract shall be void *as against him*, and the purchaser has a right to be off his bargain. So, *à contrà*, if the plaintiff does not pay the money, *the defendant* may avoid the contract: but the purchaser cannot say—"I am not ready with my money, therefore, I will avoid the contract;" nor can the seller say, 'my title is not good, therefore I shall be off.'"

This does not seem to be an unreasonable construction of the agreement; while the other way of looking at it enables the vendor, if afterwards desirous of being off, to avoid a contract fairly entered into, by simply refusing to produce his title: on the other hand, it must be admitted, that the purchaser, *knowingly entering into a con- [*643] tract upon these terms can hardly be entitled to complain if the vendor should afterwards make an unfair use of it, since it is a weapon of annoyance he could not have used without the purchaser's consent. Be this as it may, it seems now to be settled, that such a contract shall be held to be actually void so as to exclude the jurisdiction of equity, if the title should, on investigation, prove to be defective, it having been decided in the late case of *Williams v. Edwards*, (h) that a purchaser has no right to elect to take a title where the contract stipulates, 'that it shall be void if the purchaser's counsel be of opinion that a good title cannot be made to the estate.' In that case the defendant, the surviving assignee of a bankrupt, had entered into articles for sale to the defendant of certain real estates, late the property of the bankrupt. The articles contained, among other things, the following term—"If the counsel of the said J. F. Williams (the purchaser) shall be of opinion that a marketable title cannot be made by the time hereby ap-

(g) 2 Taunt. 277.

(h) 2 Sim. 78.

pointed for the completion of the said purchase, this agreement shall be void and delivered up to be cancelled." On investigation, it was found that the vendor could make out a good title to the fee simple of two-thirds only of the freehold part of the property, and that he was seised of the remaining third, and the whole of the copyhold part for the life of the bankrupt only. The purchaser, upon this, *filed a [*644] bill for the specific performance of the agreement; and if it should appear that the defendant could, as to part of the property, only convey for the life of the bankrupt, that he might be decreed to convey accordingly; and that, in respect of the deficiency, an abatement might be made to the plaintiff out of the purchase-money. For the plaintiff, the general principle that a purchaser is entitled to have all the vendor can convey, with compensation for the deficiency, was relied on.⁽ⁱ⁾ To this, however, it *was very justly replied by the Vice-Chancellor, that this principle applied only to cases where the [*645] contract was general, but that here the application of it was excluded by the express agreement of the parties. His Honour then adverted to the clause in the articles which has been mentioned, proceeded thus—"This particular clause in the agreement I must take to be the contract both of the vendor and purchaser. They might both think it reasonable that the agreement should be put an end to, if the counsel of the purchaser should be of opinion that a marketable title could not be made. There appears to be nothing unreasonable in that; there might be circumstances which might render it expedient to insist on such a term, and, as it was the contract of the parties, this Court cannot make a new contract for them. The parties have stipulated that in a given event, the contract shall be void. My opinion is, that, if parties make a contract in this very special manner, the Court, which is to compel the specific performance of the contract between them, is bound by the terms of the agreement; and therefore the purchaser is asking to enforce an agreement which he himself had agreed should, under the circum-

(i) "No one will dispute this proposition, that, if a man offers to sell an estate in fee simple, and it appears that he is unable to make a title in fee simple, he cannot refuse to make a title to all that he has. The purchaser may insist on having his estate such as it is. The vendor cannot say that he will give nothing, because he is unable to give all that he has contracted to give. If a person possessed of a term of 1000 years, contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey the term; and this Court will arrange the equities between the parties." (Per Lord Eldon, in *Wood v. Griffith*, 1 Swanst. 54.) In *Mortlock v. Buller*, he expresses himself to the same effect—"I also agree, if a man, having partial interests in an estate, chooses to enter into a contract, representing it and agreeing to sell it as his own, it is not competent in him afterwards to say, that though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract; and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole." (10 Ves. 315.) In *Western v. Russell*, (3 Ves. & Bea. 192,) Sir W. Grant, in advertance to a similar question, thus expresses himself—"It is then said, that there is a considerable portion of the estate to which no title can be made, and therefore there can be no execution of the contract. That defence, simply so stated, is quite new in the mouth of the vendor. It is not necessary here to determine, whether, under any circumstances of deterioration to the remaining property, the vendor can be exempted from conveying that part to which a title can be made; but the proposition is quite untenable, that if there is a considerable part to which no title can be made, the vendor is therefore exempted from the necessity of conveying any part."

[*646] stances which "have happened, be void." And the bill was accordingly dismissed, and with costs, on the ground that the purchaser was seeking to enforce a contract, which, under the contingency which had taken place, he had himself agreed should be void.

SECTION III.

Of the Acts by which the Purchaser will be considered to have waived Objections to the Title.

The question, whether a purchaser has or has not waived his right to have the title strictly investigated, has been stated to be one of fact, namely, whether the Court is satisfied that the purchaser has intended to waive, and has actually waived his right to examine the title? and that when the Court is satisfied that this is the just conclusion from the circumstances of the case, then, and then only, is it authorized in denying him his ordinary equitable right. (k)

The acts from which the Court will infer that the purchaser has waived his right to object to the title, are numerous; but all resolve themselves into this, that they are inconsistent with the notion of the purchaser having intended to insist upon any defect in it. If a purchaser goes on with the negotiation after notice of a defect in the title, this conduct unexplained is a waiver of the defect; so, also, is asking [*647] "indulgence of the vendor as to the time of paying the purchase-money, because, unless the purchaser had accepted the title, he is not liable to be called on for payment of the purchase-money; preparing and tendering the conveyance, is a plain and manifest acceptance of the title; and lastly, acts of ownership, such as repairing or altering the premises, cutting down timber, making drains, entering into sub-contracts for the sale or lease of the whole or part of the estate, &c., &c., will, although upon a very small scale, be an acceptance of the title.

Where, however, the waiver is to be inferred merely from acts of this kind, they must be of a very clear and unequivocal character; and the vendor must make out very conclusively from them, that the purchaser has released him from the obligation of proving his title,—an ordinary equity which the Court is particularly careful to enforce, on the plain principle, that a vendor, in seeking to compel a purchaser to accept an estate, is bound to submit his title to such a scrutiny as satisfies the Court that the defendant may safely part with his money. (l) And hence any combination of the acts above mentioned, or even all of them, may concur, and yet, under the circumstances, they may not afford the inference that the purchaser has accepted the title. A case where this occurred will presently be stated.

It is laid down by Sir W. Grant, in *Fludyer v. Cocker*, (m) [*648] that "entering into possession generally amounts to a waiver of objections even to title." This proposition must be taken with considerable qualification. The mere fact of taking possession will not alone

(k) Per Sir Thomas Plumer in *Burroughs v. Oakley*, 3 Swanst. 166.

(l) *Burroughs v. Oakley*, 3 Swanst. 167.

(m) 12 Ves. 27.

have the effect here ascribed to it; although it is a very material circumstance when taken in connection with other acts, from which the intention of the purchaser to waive inquiry either as to the whole title, or particular objections to it, may be inferred: as, if the additional circumstance be an abstract delivered, and no objections made to the title in a reasonable period, the purchaser will be considered to have waived his right to investigate the title.

Thus, in *Fleetwood v. Green*,⁽ⁿ⁾ the articles of agreement, under which the purchaser was to be let into immediate possession, were dated March, 1803; he was let into possession accordingly; an abstract was shortly after delivered; no objections were taken. In the month of March, 1805, at which time, by the articles, the contract was to be completed, he was applied to for this purpose, but without success. In August, 1807, the vendor filed his bill. The defendant put in his answer, admitting these facts, and that in several instances he had treated the premises as his own, and submitted to complete the contract upon having a good title. It was held, clearly, that he had waived his right to have the title investigated; and specific performance was decreed accordingly.

*In this case, it is to be observed, that there was great delay, and that a long period elapsed before any objections [*649] were taken to the title. Mere delay, however, is not a sufficient ground for drawing the conclusion, that the purchaser has waived his right of examining the title. Adverting to this point, in *Burroughs v. Oakley*,^(o) Sir Thos. Plumer thus expresses himself:—"The difficulty in this case, which distinguishes it from every other, is, that, after possession taken, and acts of ownership, the investigation of title proceeds; and the question is, whether the delay in the investigation affords proof that it was abandoned? In the many instances that have occurred of culpable delay, perhaps for the purpose of retaining the purchase-money, delay has not precluded an examination of the title. That conclusion requires not mere delay, but delay accompanied by acts which afford evidence of an intention to waive the examination." The decisions in *Fleetwood v. Green*,^(p) and the other cases, where there was great delay, are founded, not on any rule of equity, limiting a time within which objections must be taken, and visiting delay with punishment; but on a conclusion of fact, the Court being satisfied that the purchaser intended to waive, and has actually waived his right of examining the title.^(q)

Taking possession after notice of a defect, unless under an express stipulation that it shall be without prejudice, clearly implies an intention to waive it; *and if the negotiation be proceeded with, and [*650] other steps be taken for the purpose of carrying the purchase into effect, without any reservation as to that defect, the inference becomes conclusive. Thus, in *Burnell v. Brown*,^(r) the purchaser insisted upon a deduction from the stipulated purchase-money, as compensation for a right of sporting reserved over part of the premises, and which was not mentioned in the particulars or conditions of sale. The circumstances were these:—The premises were sold in the month of September, 1812—shortly after, a deposit of 10*l.* per cent. was paid—and the remainder of

(n) 15 Ves. 594.

(p) 15 Ves. 594.

(r) 1 Jac. and Walk. 168.

(o) 3 Swanst. 171.

(q) *Burroughs v. Oakley*, 3 Swanst. 168.

the purchase-money was to be paid in the April following, at which time possession was to be given. An abstract was delivered in January, 1813, which stated the reservation in question. The purchaser, in the following April, was let into possession at his own request. Several letters passed between the plaintiff and defendant and their solicitors, the greater part of the purchase-money was paid; and no objection to the completion of the contract, on the ground of the reservation in question, was made till the October following. The Lord Chief Baron, sitting for the Master of the Rolls, on a consideration of the facts, was clearly of opinion that the purchaser's being let into possession, under these circumstances, was a waiver of the objection.

A point came incidentally into discussion, which ought not to be passed [*651] over. After the month *of October, at which period the Chief Baron was of opinion that the objection had been waived, a clerk of the vendor's solicitor, in answer to the letter containing this claim, said that a reasonable compensation would be allowed; this was done, however, without the concurrence of the vendor, who, upon its coming to his knowledge, refused his assent; and the clerk, being examined in the cause, admitted that he had no express authority from the vendor or his solicitor to accede to the purchaser's demand. Upon these facts it was held—"That if the contract was previously completed, it was impossible to set up any new contract between them, without an authority given by Burnell."

It has been already stated, that asking for indulgence as to the payment of the purchase-money, is a strong circumstance from which it is to be inferred that the purchaser has accepted the title—and upon this principle, mainly, the decision in the *Margravine of Anspach v. Noel* seems to have turned. (s) In that case, the agreement for the sale to the defendant of certain leasehold premises was dated on the 22nd August, 1811; possession was to be given, on the 10th of October following, to the purchaser, and the residue of the purchase-money was to be paid within a year from the date of the agreement, upon having an assignment of the property executed to him. The purchaser was let into possession [*652] accordingly on the 10th October. On the *8th November, his solicitor applied for the abstract of the title; on the 28th it was delivered to him; and no objections were taken till the month of January, 1814, upwards of two years after the abstract was delivered. The purchaser, in the mean time, had not only been in possession, but had made alterations, and let the premises. In the interval, there were communications from the purchaser to the vendor's solicitor, expressive of his vexation at having been obliged to delay payment of the purchase-money. After all this the purchaser, on the 15th March, 1815, put in his answer to a bill for specific performance, admitting these facts, but stating that he had not intended to waive the title. The question was, whether he had actually waived the title?

It was clear, in this case, that possession could not be considered an approval of the title, because it was agreed by the articles to be given on a fixed day, and was taken accordingly; the point of waiver turned, therefore, upon the correspondence, and acts of ownership. In these letters, the purchaser expresses his vexation at the delay in paying the purchase-

(s) 1 Madd. 310.

money, which seems clearly to imply that he had approved the title; for, if the title was objectionable, and he had not, in point of fact, meant to accept it, he could not have accused himself of delay. In the same letter, he speaks "of the liberality and patience" which had been shown him; but it is difficult to conceive that he could have discovered any "liberality and patience" in the vendor, in forbearing to insist on payment of *the purchase-money, to which he was not entitled [*653] till the objections to the title were removed. During a correspondence of many months, although he had the assistance of a legal adviser, he made no objection to the title; besides all this, he had been making alterations, letting the premises, and, in fact, dealing with them in every respect as his own; and the Court held, therefore, that he had waived his right to object, notwithstanding his statement in the answer, that he had not intended to waive them; the Court very truly observing—"That objections to a title should be made with due diligence; and that, if a party act in such a manner, as that it may be implied he does not mean to object to the title, he cannot afterwards, at a distance of time, when perhaps evidence may be lost, insist upon objections."

Where acts of ownership have been committed by the purchaser, subsequently to the discovery of the objections he had taken to the vendor's title, they will influence the Court more strongly than where they have been committed previously to the discovery of these objections. (1)

As when, by the contract, it is stipulated that possession shall be delivered or taken on a given day, a purchaser, by taking possession, gives no evidence of his intention to waive objections to title; so, if he takes possession at the request of the vendor, or with his privity and concurrence; or, if the nature of the contract be such as to render it *reasonable that the purchaser should be let into immediate possession, although it may not be practicable for some time to make a good title, as where the contract relates to the sale of partnership property, the same principle applies. The last part of this proposition is strikingly illustrated by the recent case of *Stevens v. Guppy*. (2) That case arose on a contract for the sale of a share of the Coseley iron-works, including the freehold, copyhold, and leasehold lands, buildings, mines, minerals, furnaces, forges, mills, machinery, and stock, and all other property, &c. belonging to them, of which the vendor was possessed. The contract was dated the 11th June, 1818, in which the vendor, Stevens, undertook to make a good title, and execute the proper conveyance, on or before the 24th of June, (which, it was admitted, meant June in the following year,) when the balance of the purchase-money was to be paid. In June, 1819, the vendor filed a bill for specific performance, stating that he had been induced to let Guppy, the purchaser, into possession, in consequence of his having promised to pay the purchase-money immediately, but of this there was no evidence, and it was denied by the answer. The plaintiff's bill charged, that Guppy and his partners had first mismanaged, and then put an end to the business; that they had removed from the premises all or the greater part of the moveable machinery, implements, and stock in trade; and that, by such conduct, the *copartnership concern had been ruined, or [*655] greatly deteriorated. The bill prayed that Guppy, the purchaser, might

(1) *Dixon v. Astley*, 1 Mer. 135.

(2) 3 Russ. 171.

be declared to have waived all objections, and might be decreed specifically to perform the agreement. The plaintiff entered into evidence to prove the deterioration and destruction of the business, and the active interference of Guppy as a partner. At the hearing of the cause, the Vice-Chancellor directed the usual reference of title, which amounted in substance to a declaration that the purchaser had not waived his objections to the title; and this decree was affirmed by Lord Lyndhurst; but, in neither case, are very satisfactory reasons for this decree given. The case, however, had in the interval been argued before Lord Eldon, who resigned the great seal before judgment was given. His opinion had, however, been given in the course of the argument, and expresses very clearly the grounds upon which this decision ought to be put—"The question comes to this—Does the ordinary rule about taking possession apply to such a case as this? Was it the intention of the parties, regard being had to the express terms and stipulations of the contract, that Mr. Stevens should be at liberty, until the 24th of June, 1819, to keep possession of the property, which, if the agreement was ever to be carried into execution, was to belong, from March, 1818, to Mr. Guppy, and not to Mr. Stevens? Or must it not have been the intention of the parties, considering what the period was at which the beneficial interests and the liabilities were to begin, that the possession should be taken immediately,

[*656] nevertheless, with an unfortunate contract *on the part of Mr. Stevens, that he should deliver the abstract, deduce a good title, and convey the premises, not then, but on or before the 24th June, 1819? And can it be said, under the effect of such an agreement as this, that *the mere taking possession is a waiver of the right to have a title made out*, which, by the very terms of the contract, was not to be made out till fifteen months after the beneficial interest (both of which were to begin nearly three months before the date of the contract,) had commenced? Under these circumstances, I think that the mere taking possession would not amount to a waiver of all objections to the title."

A purchaser by offering the whole or part of the estate for sale or lease, will generally be considered, by such an act, to have taken the title *pro bono et malo*. Such conduct appears strongly to show that the purchaser considered the estate as his own; but even this may be qualified by circumstances, as in *Knatchbull v. Grueber*, (v) where the title to a small part of the estate, called Cole Nash, being defective, it was insisted on the part of the vendors, that the purchaser had, by his conduct, waived his right to object to it. The circumstances so far as they bear upon this point, were these:—The estate in question was advertised for sale on the 16th October, 1811, previously to which the plaintiffs agreed to sell it to the defendant by private contract, by which it was provided "that the sale of the premises should take place as advertised, but the

[*657] same should be *bought in on the part of the vendors, and if any part was sold, such sale should be on the account, and at the risk, of Grueber." The sale took place accordingly, and Mr. Wildman became purchaser of part of the estate. The defendant's concurrence in this purchase (which could not be completed without that concurrence,) was held out by the bill as a proof of his acquiescence in the title. Part of the abstracts was delivered in December, 1811; the

(v) 1 Madd. 170.

remainder was not delivered till the 24th April, 1812. An opinion was given on the 15th May following, that there was not a good title to Cole Nash, unless certain queries and observations were satisfactorily answered. In the latter end of the intervening month of March, the purchaser offered up for sale certain parts of the estate, including Cole Nash. In his answer he admitted, that having it in contemplation to sell the marsh land comprised in Lot 3, and part of the premises comprised in Lot 1, in order to reduce his purchase, and being desirous, at the same time, of ascertaining the value of other parts of Lot 1, (including Cole Nash,) with a view to a more equal distribution by will, he, in the latter end of March, 1812, gave orders to an auctioneer to put up the same for sale; but, on the representations of his solicitor, he desisted from the sale; and that, at the time of such proposed sale, he had not obtained an opinion upon the title. There was one or two other points upon which the vendors relied as evidence of waiver of objections, the nature of which will sufficiently appear from the judgment of the [*658] Court, by *which the whole of these matters were held not to amount to acceptance of the title. "The next question," said Sir Thos. Plumer, "is, whether the defendant has, by his conduct, precluded himself from insisting on a good title to Cole Nash? It is said, that by meditating a sale at Cole Nash, he showed that he did not look upon it as essential to the enjoyment of the estate; but the defendant by his answer, which, as to this, has been read as evidence, says, that though he put up to sale, he did this only to ascertain its value, and not with a view of really selling it. The ratifying of the sale to Wildman, purchasing the stock, and agreeing as to the employment of his deposit, after he was fairly informed by the plaintiff's solicitor that the title to Cole Nash could not be bettered by further inquiry, are not conclusive circumstances to show he did not consider Cole Nash as essential to his purchase; because he is constantly asking for the title to Cole Nash, and never appears to have lost sight of a good title, but from first to last insists upon it. The title was not, as in *Fordyce v. Ford*, incurable, but might have been rendered good, if certain inquiries were satisfactorily answered; it was not absolutely but contingently bad. A man, by going on to treat, does not waive an objection he is continually insisting upon. If nothing had been said of Cole Nash, after the title to it was found defective, the objection might have been considered as waived, but here he is perpetually desiring to have a good title. This case, therefore, is like *Drew v. Hanson*, where further inquiries being *insisted [*659] on, the objection was not considered as waived. A treaty cannot waive that which it treats about. There is nothing, therefore, in the conduct of the defendant, which precludes him from insisting on a title to Cole Nash. If a man goes on treating, and then finds a particular piece of land, to which no title can be made, is essential to his purchase, may he not, notwithstanding such a treaty, insist on the materiality of the land? Surely, in justice and common sense, he may."

In *Burroughs v. Oakley*, (w) the bill stated the sale to the defendant by public auction, on the 12th June, 1812; that the abstract was shortly after delivered; that the defendant took possession in the August following; that he has since cut three falls of underwood; that, after the receipt

of the abstract by the defendant's solicitor, a correspondence(x) ensued between the solicitors of both parties, and, in November 1814, the defendant's solicitor transmitted to the solicitor of the plaintiff a draft of a conveyance of the premises, approved on the part of the defendant; and the bill charged that the cutting underwood, and other acts of ownership, [*660] amounted to "an acceptance of the plaintiff's title. These were held, however, insufficient to exonerate the vendor from his ordinary obligation of proving his title. The grounds of this decision are very satisfactorily stated by Sir Thos. Plumer, in his judgment. "In proceeding to consider the effect of the evidence, a Court of equity, called on to enforce specific performance of an agreement for the conveyance of an estate to one party, and payment of the purchase-money to the other, must feel anxiety to protect the purchaser, and give to him reasonable security for his title, not compelling him to take a title, without knowing whether it is good or bad. The vendor, if his title is good, suffers only the temporary inconvenience of delay; but the vendee, if it is bad, may sustain a severe loss. The inclination of the Court, therefore, is in favour of the vendee; and a vendor claiming to be excepted from the general rule, is required clearly to establish a case of exception. What circumstances has this plaintiff proved to warrant the Court in considering the present as an excepted case?

"Possession was taken of part of the lands at Michaelmas, 1812, and of the remainder at the end of the year, under a contract which is silent on the subject of possession, and under which possession so taken is premature; the vendee being bound to pay interest on the purchase-money from the 31st August, 1812, a provision which seems to denote that the parties contemplated delay. Two lots of recently inclosed land are sold for considerable sums, and it being an express term of the contract that the [*661] "purchase-money should not be paid without a good title shown, and possible that delay might occur, in August, 1812, possession is taken; in what circumstances the Court is not apprized; but it must be presumed to have been taken with the concurrence of the vendor; there is no proof that it was contrary to his wishes, or accompanied by an obligation on the vendee to waive any right. That the vendee did not by taking possession waive the investigation of the title is clear. More than a year after that event, the parties were negotiating on the subject of title. What revived the investigation if then waived? In 1813, an abstract and a farther abstract were delivered; for what purpose, if the question of title had been abandoned? It must be concluded, therefore, that possession was prematurely taken with the consent of both parties, but without an intention of waiving the investigation of the title.

"The same principle applies to the acts of ownership; for what could be the purpose or advantage of taking possession, except to act as owner? The evidence on the part of the defendant seems not to have carried the case farther than the evidence on the part of the plaintiff; the act insist-

(x) At the hearing, the counsel for the defendant objected to the production of the letters of his solicitor, offered on the part of the plaintiff, as evidence that the defendant had accepted the title. It was insisted, that, in order to be distinctly put in issue, they should have been set forth at length in the bill, as in the *Margravine of Anspach v. Noel*, (1 Madd. 310 ;) and it was said that in *Selby v. Selby*, (3 Mer. 2,) Sir W. Grant refused to receive in evidence letters not charged in the bill: but the objection was overruled.

ed on is cutting underwood. Had I known the nature of the evidence offered by the defendant, namely, evidence of the judicious exercise of acts of ownership, I should have doubted whether it was admissible; but as an explanation of the acts insisted on by the plaintiff, I thought that I ought not to reject it. Whether included or excluded, the acts of the defendant seem *no more than the proper acts of a person [*662] intrusted with possession, bound to take care of the estate, and not to leave the crops uncut and waste; acts of preservation, not of destruction. The conclusion depends on that distinction. A fall of underwood, which must be cut by the person in possession at the regular season, is no more than gathering a crop of corn or hay. In the absence of proof that the fall was improper or contrary to custom, it is only an annual crop which a tenant for life would enjoy as one of the ordinary fruits incident to the possession, and of which it could not be intended that the party in possession was not to have the benefit. The delivery of a farther abstract, after a fall of underwood, is quite inconsistent with the supposition, that by that act the purchaser had made the estate his own, and precluded himself from an examination of the title.

"The case finally resolves itself into the conveyance, the strongest of all the facts alledged, because it is open to the observation, that the parties are engaged in an act which in the ordinary course of business is posterior to the investigation of title. It is not till after the title has been examined, that a draft of the conveyance comes to be prepared. The preparation of the conveyance, in this case is an important fact, as amounting to evidence that the parties had arrived at the stage of proceeding subsequent to the question of title, and must be supposed, therefore, to have removed or abandoned all objections. But I cannot satisfy myself, that that fact alone in the circumstances of this case is sufficient to exclude the *common equity. The plaintiff had given [*663] no strong proof of desire of despatch; for entering into the contract in June, 1812, he has not delivered a farther abstract till November, 1813, and that imperfect and insufficient. If the difficulties attending the title had been removed, what occasioned the delay? The business proceeded slowly in 1814, without any urgency on the part of the vendor to determine whether the purchaser meant to proceed with the examination of the title, or was satisfied."

As the purchaser by his conduct may waive his right to a strict investigation of the title, so the vendor may, by his conduct, preclude himself from the right of enforcing the contract. As a purchaser, by treating the estate as his own, is said to have waived objections to the title; so, on the same principle, a vendor, who, after the contract, is in equity a trustee for the purchaser, who is in equity the owner of the estate, acting in such a manner as to show that he does not consider the purchaser as the owner, precludes himself from enforcing the contract in equity, on the ground that he has repudiated the principle on which that relief is afforded. Hence, if a purchaser, being in possession under the contract, be afterwards, in the course of negotiations upon the title, forcibly ejected by the vendor, the Court will not enforce specific performance at the instance of the latter. "Possession," says Lord Eldon, "being taken under the contract, the effect of it is to enable the vendor to say—'You have taken possession under the contract, I am entitled to enforce the con-

[*664] tract; *and if then it should happen, that there turns out to be a defect of title as to a part which is immaterial both in quantity and situation, yet the vendor is not at liberty to disturb the possession, but he must come here, and, leaving the possession as it is, must lay his case before the Court, to see whether there shall or shall not be a specific performance.”(y)

This point is illustrated in the case of *Knatchbull v. Grueber*, already cited. A good deal of correspondence having taken place with reference to the title to *Cole Nash*, between the 15th April, when counsel's opinion was first had upon it, and the 5th October following, without getting the difficulties cleared up, a transaction commences, which Lord Eldon represents as “the most important of any between the parties”—the nature and effect of which is thus very clearly stated by his Lordship: “The solicitor for the plaintiffs, by his letter of that date, instead of representing to the defendant, (who was in possession, and who was in possession under the contract, which, if it were in any way to be performed, gave him a title to the possession,) that, if he had taken possession with a knowledge of the title being defective to that part of the estate, he had fallen within many of the decided authorities; instead of insisting, (as they now insist,) that the twelve acres are so immaterial, that he is bound to take the property at the price stipulated, only with a reasonable compensation for

[*665] the value of those twelve acres, the solicitor for the plaintiff *writes thus to the defendant's solicitor:—“Without entering again into the motives of Mr. G.'s conduct, I will thank you to inform him that I am directed to tender his deposit-money, with interest, and to demand from him that part of the estate of which the vendors have given possession; and for these purposes, I shall, on behalf of my clients, attend at Mr. G.'s house in Coleman Street, on Wednesday next, at twelve o'clock.” Now, if the plaintiffs had a right to insist on the performance of the contract, what right could they have to turn the defendants out of possession, which was taken under that very contract? The defendants had a right to retain possession under the contract, till a conveyance should be executed, provided the difficulty about the title could be set right, which was still a point in question. But the plaintiffs by this act destroyed the contract: and how can they now pretend to have reserved a right to its performance, when, by their own act, it has been rendered incapable of being performed?(z) Where parties enter into a contract for the sale and purchase of an estate, and the vendor is unwise enough to make it part of the contract that the purchaser shall take immediate possession, and the question afterwards arises, whether it is a case for compensation as to a part to which he is unable to make a title, the vendor cannot in such a case, (to use the language of this defendant,) turn the purchaser in and out of possession, just as, and when, he thinks proper.”(a) And after adverting *to several questions [*666] agitated in this cause, his Lordship concluded thus:—“But without entering into those cases, the ground upon which I rest the present case is this—that nothing was done previous to the 5th October, 1812, amounting to a waiver on the part of the defendant of his right to the

(y) *Knatchbull v. Grueber*, 3 Mer. 141.

(z) 3 Mer. 142.

(a) *Id.* 144.

possession; and that the turning him out of possession at that time, was an act, however meant, which has rendered it impossible for the vendors specifically to perform their part of the contract, even if they would otherwise have been entitled to a specific performance, with a compensation to be made for the defect of title to Cole Nash. And, upon this ground, I am of opinion, that the decree of the Vice-Chancellor should be affirmed."(b)

(b) 3 Mer. 146.

APPENDIX.

(A.)

Earl of CHESTERFIELD v. SIR ABRAHAM JANSEN.

(HIL. T. 24 GEO. 2.—IN CHANCERY, FEB. 4, 1750.)

MR. SPENCER, in 1738, being possessed of an income of about 7000*l.* *per annum* for his life, and of a personal estate in plate, jewels, and furniture, of near 20,000*l.*, and having contracted debts to the amount of upwards of 20,000*l.*, great part of which was owing to tradesmen, who were pressing for their money, and whom he was desirous to pay off, resolved, for that purpose, to borrow or raise a sum of 5000*l.*; and, as he had a well-grounded expectation of a vast increase of his fortune, on the death of his grandmother, the Duchess of Marlborough, in case he survived her, he resolved to contract upon that expectancy. Mr. Spencer was then upwards of thirty years old, originally of a hale constitution, which, by former irregularities, might have been impaired; and, though his conduct was become more regular, yet, in general he was careless of his health, addicted to some habits prejudicial to it, and which he could not be prevailed upon to leave off. The Duchess of Marlborough was then seventy-eight years old, hearty of her age, and very careful of her health; but, though she might be called a *good old life*, and Mr. Spencer a *bad young* one, yet, in the ordinary course of things, it was much more probable she should die before him, and yet, it would not have been any thing extraordinary if he had died before her. In this state of things Mr.

[*668] Spencer sent to market a proposal which he *supposed would easily find a purchaser; namely, that, if any one would lend or advance him 5000*l.*, he would oblige himself to pay 10,000*l.* at or soon after the Duchess of Marlborough's death, if he survived her; else, the 5000*l.* to be lost. The proposal was offered to two persons who understood the value of such contracts, and did not think the terms advantageous enough for them to meddle with. The defendant at first hesitated, and at last accepted the offer; and thereupon, 17th July, 1738, Sir A. Jansen paid Mr. Spencer 5000*l.*, and Mr. Spencer executed a bond to him in 20,000*l.* penalty, conditioned to pay him 10,000*l.* at or soon after the Duchess's death, in case he survived her; if he did not, the bond to be void.

The Duchess lived six years and five months after this contract, and died the 18th October, 1744. Mr. Spencer lived eight years and one month after the contract, and died the 19th June, 1746; so that he survived the Duchess one year and eight months. Upon the Duchess's death, it did not very clearly appear who made the first application, Sir A. Jansen for his money, on Mr. Spencer for time to pay it in; for

though, on the Duchess's death, Mr. Spencer came into a vast increase of annual income, to the extent of 21,000*l. per annum*, yet, he could not immediately receive such a sum as might enable him to pay off 10,000*l.*; but he most freely and readily came in to giving the defendant new securities for the absolute payment of 10,000*l.*; and, as it should seem by the deposition of one of the witnesses, was not unapprized that the old security might have been liable to dispute. Accordingly, on the 8th December, 1744, Mr. Spencer freely executed a bond, dated the 19th October, 1744, in the penalty of 20,000*l.*, conditioned to pay 10,000*l.* on the 19th April following, and at the same time executed a warrant of attorney for entering up judgment on that bond, which was afterwards done. In 1745 Mr. Spencer at two different times, paid two several sums of 1000*l.* each, in part of this debt, and then, as well as at several other times, expressed himself as well pleased with the defendant's *behaviour towards him, and as earnestly desirous [*669] to pay him his whole demand as soon as possible.

After Mr. Spencer's death, the defendant sued out a *scire facias* on the judgment against Lord Chesterfield and others, who were Mr. Spencer's executors, in order to have execution. Whereupon, the executors brought their bill for an injunction to stay proceedings at law, and to be relieved upon paying 5000*l.*, which was the sum originally advanced to their testator, with interest from the time of advancing it and costs.

The Court was assisted at the hearing by the two Chief Justices, the Master of the Rolls, and Mr. Justice Burnet.

Lord HARDWICKE, C.—The great and able assistance which I have had in this cause, makes my task extremely easy; and as I concur with my Lords the Judges, and his Honour the Master of the Rolls, in the decree I shall make, the useful pains they have taken in considering and clearing up the several points, might have excused me from spending much of the time of the Court. One thing I ought to say in the outset, by way of excuse for the trouble I have given them; that, if I could have foreseen upon what particular point the judgment in this cause would fundamentally have turned, I should have been desirous to have spared them the interruption and solemnity of this attendance. As three points have very properly been made at the bar it is necessary to say something to each of them.

The first is, Whether the bond of 17th May, 1738, was void at law by virtue of the statute of usury?

Second. Supposing it to be valid in law, whether it was contrary to conscience, and to be relieved against in this Court upon any head or principle of equity?

Third. Whether the new security given in October, 1744, after the Duchess of Marlborough's death, amounts to such a confirmation of the former contract, or to such a new agreement by Mr. Spencer, as is sufficient to bar the plaintiffs, his representatives, of any relief in this Court?

*The first of these points is a mere question of law upon the construction of the statutes of usury, and the rules established by the several resolutions which have already passed. [*670] And here the question is exactly the same as it would have been in a Court of common law, if an action had been brought upon the bond, and the whole matter had been disclosed by special pleading. Upon this point,

my Lords the Judges have been very clear and uniform in their opinion, that this contract is not *usurious*, nor void by the statute. And if I had even now any doubt about it in my own mind, I should, however, have held myself to be bound by that opinion, as a matter properly within their cognizance, in like manner as if I had originally sent it to be tried at law; in which case this Court decrees consequentially to the trial. But, in truth, I have no doubt about it, and do concur in the opinion which has been given on this head.

The question was extremely laboured by the plaintiff's counsel, many authorities produced, and strong inferences made. But, so far as I have been able to observe and collect, the great stress was laid here, that contracts upon contingency are to be distinguished, that a plain fair wager upon a chance is not within the statute, because it is no loan; but if there is a loan of money, with an agreement to receive back more than the principal and legal interest, in any event, there, although a contingency be thrown in, upon which the whole by possibility may be lost, this is *usurious*, and contrary to the statute. I will not enter into a critical dissertation how far any such contract upon a fair contingency, by the falling out of which one way the whole money may be lost, is in strictness a *loan*. The civil law has very refined distinctions on this head. *Commodatum* and *mutuum* are their technical terms for a loan, where the thing lent is to be restored *in specie*, which is one species of bailment in the common law of England. By the second the civilians mean a loan, when the thing lent is to be restored *in genere*. But, in both these, the thing lent was to be restored in all events, and nothing was to be paid for the *use* or *hire* of it. Where any thing was to be paid for the *use* or *hire*, it was termed by the Roman "lawyers *locatum et conductum*;" [*671] and perhaps all our loans of money at interest would, in the strictness of their law, come under the head of *locatio et conductio*. But it is clear that the law of England, though, as to personal property, derived much from the Roman law, has not adopted those minute distinctions. That we mix and confound together their *commodatum* and *mutuum*, is plain from the known form of every declaration in an action upon the case for money lent, which is always described by both terms, *mutuo data* and *accommodata*. In like manner, though interest is to be paid, it is with us still a *loan*. So, though money be advanced upon a risk, and by a contingency may be totally lost, it is still allowed to be a loan of money; and all our law books which treat of bottomry, call it money *lent* upon *bottomry*. Further, that, in the notion of the law of England, there might be a loan upon a risk or contingency, is plain by the express words of the statute 11 Hen: 7, c. 8, which was cited at the bar for another purpose. That statute contains a general prohibition of all usury and interest; and one of the offences described is, "that every person *lending* or *taking* any money to any person for a certain time, and taking lands, tenements, or any hereditaments or other bonds for present security or sure payment of his money lent at the time assigned, without *condition* or *adventure*, and also at the time of the same loan, covenanting, appointing, or contracting *that he that lends the money* shall have the revenues or profits of the same lands or tenements of him that so borroweth or taketh money, by a certain time shall forfeit the money," &c. Hence it appears they understood an adventure might be inserted in a contract of loan; and it is observable, that this, if

real and fair, exempted it from the laws against usury, though at that time all usury or taking of interest was unlawful. Having established that, by the law of England, the insertion of a contingency will not of itself prevent a contract from being a loan, consider what is the result of the cases cited upon the statutes against usury. As they have been already very fully and correctly stated, I will not repeat *them, but [*672] only deduce the proper and natural inferences from them.

1st. If there has been a loan of money and a contingency inserted, in consideration whereof a higher interest or *premium* for forbearance has been contracted for than the law allows; if the contingency or risk has gone only to the interest or premium, and not to the principal also, there, although the contingency has created a real and substantial risk of the interest or premium, it has been held contrary to the statute, because the money lent was not put in hazard, but safe at all events: in all such cases no inquiry has been made, or regard had, whether the contingency was real or only colourable and elusory; let the contingency be what it would, it availed nothing. This is within one of the distinctions taken by Mr. J. Doderidge, in *Roberts v. Tremaine*,^(a) where, by the way, he plainly takes it for granted, that with us a loan of money may be upon a casualty.

2ndly. If the contingency has extended both to the principal and interest, and in that respect a higher rate of interest contracted for; then regard has been had to the reality and *bona fides* of the risque—the Courts of law have in these cases inquired, Whether the contingency has created a real substantial risque of the money, or was only colourable and elusory? for if it has appeared to be only colourable and elusory, it has been held to be contrary to the statute, because it was only a shift or evasion to get out of it, which is prohibited by the statute itself. This is *Clayton's case*,^(b) and the case put by Popham, C. J., in *Burton's case* immediately preceding it, and *Mason v. Abdy*.^(c)

3rdly. But where the contingency has extended to the principal and interest both, and has not been colourable only, but has created a fair and substantial risque of the whole, it has been held to take the case out of the statute, because the whole has been put in hazard; and this is the last member of Mr. J. Doderidge's distinction in *Roberts v. Tremaine*. Although it is called a loan, it is considered *as a bargain upon chance, and differs little from a wager. On this depends the [*673] case of *bottomry*; for the sound fundamental reason is, that it is a fair contract upon a real hazard, and not that it concerns trade; the consideration of commerce has been mentioned and taken in aid by the judges, but not alone relied upon, for no consideration of trade or commerce can support usury contrary to an express act of Parliament.

That the contingency or hazard was in this case real and substantial has been fully proved, and the degrees and proportions of the chances stated, which it is unnecessary to repeat. The plaintiff's counsel have laid great stress upon certain expressions and *dictums* of the judges in some of the cases, *that there must be no transaction of borrowing or lending, and that care must be taken that there be no communication concerning borrowing and lending*. Hence they have inferred, that, as the first proposal in the present case was to borrow money upon a

(a) Cro. Jac. 508.

(b) 5 Co. 70.

(c) Carth. 167, and Comberb. 125.

contract to pay two for one, this is *usurious* within the authorities, notwithstanding the throwing in the contingency of Mr. Spencer's surviving the Duchess of Marlborough. A very right answer has already been given to this, that Courts of justice are to regard the substance of things and contracts, and not mere words, which may be inaccurately used by parties in their private dealings. But another answer may also be given to it. In the books which speak at all correctly, those expressions are applied to cases arising on the purchase of annuities, or sales of goods and merchandizes for time at a *premium* or advanced profit beyond the rate of legal interest, and to such they are properly applicable. But to loans upon contingency, I mean a fair real contingency, they cannot properly be applied, for there, from the nature of the thing, the communication must be about borrowing and lending, as is plain in the case of *bottomry*; and the case put in terms by Mr. J. Doderidge, where he expressly says,—“If I lend 100*l.*, to have 120*l.* at the year's end upon a casualty, if the casualty goes to the interest only, and not to the principal, it is usury.” And this he illustrates by the case of [*674] *bottomry*, which he specifically calls a *loan*. The very stating the facts upon the purchase of an annuity, or a sale of goods, will prove the truth of this observation. A man may lawfully purchase an annuity at as low a rate as he can procure it, provided the original intent of the parties was to purchase and sell an annuity; but if the treaty between the parties begins about borrowing and lending a sum of money, and ends in the purchase of an annuity for years, or possibly for life, that is evidence that it was only a method or contrivance to split the payment of the principal and usurious interest into several instalments, turned into the shape of an annuity, and consequently was a shift to evade the statute. Thus, in Fuller's case, (d) and Tanfield v. Finch, (e), where the reason is exactly the same as I have mentioned. The like in Symonds v. Cockeril, (f) which I take to be on the same deed as that of Cockeril v. Hamington. (g) In the same manner, in the case of sales of goods and merchandize, it is lawful for a man to sell his goods at as dear a rate as he can, on a clear bargain by way of sale. But if A proposes to borrow a sum of B at interest for a time, and B says he will not lend at such an interest, but will sell him goods at such an high rate for a time, which is much beyond the market price, this is a shift and evasion to elude the statute, and the original communication about borrowing and lending proves it. This was Beecher's case and Wick's case, both cited in Reynolds v. Clayton. (h) The very putting of these cases shows how proper and forcible those *dictums*, or expressions, of the judges are, when made use of in them; but how improper and inapplicable they are, when thrown out concerning loans of money upon contingency.

I come, now, to the second question. Supposing the first contract, of May, 1738, to be valid in law, whether it was contrary to conscience, and ought to be relieved against in this Court, on the principles of equity? [*675] Upon this head, I shall follow the prudent example which has been set me by my Lords, the judges, and the Master of the Rolls, who have gone before me, by not giving any direct or conclusive opinion. As it would be unnecessary in the present case, it is

(d) 4 Leon. 208.

(g) 1 Brownl. 180.

(e) Cro. Eliz. 27.

(h) Moor, 397.

(f) Noy, 157.

safest not to do it, and yet it has been made necessary to say something upon it.

No wise and good man can say that contracts of this kind deserve to be encouraged; for they generally, if not always, proceed from excessive prodigality and extravagance on the one hand, and extortion and avarice on the other. These are prolific, and generate one another, and as they are *vitia temporis* and extensive in their pernicious consequences, if any Court has a proper jurisdiction, and is warranted by rules or a course of precedents to restrain them, it is their duty so to do. This Court has an undoubted jurisdiction to relieve against every species of fraud.

1st. Fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition or circumvention committed by one man upon another. This is the plainest case.

2ndly. Fraud may be apparent from the intrinsic value and subject of the bargain itself; such as no man in his senses, and not being under a delusion, would make on the one hand, and as no honest conscientious man would accept on the other. These are called hard, unequal, unconscionable bargains. Of such the common law has sometimes taken notice, as in *James v. Morgan*,⁽ⁱ⁾ where, in an *assumpsit* for the price of a horse, there was a special contract laid, to pay for the horse a barleycorn a nail, and double it every nail, which, in evidence, appeared to come to 500 quarters of barley on the whole. The cause was tried before my Lord C. J. Hyde, at Hereford, who directed the jury to have no regard to the special agreement, and to give only the value of the horse in damages.

3rdly. Fraud may be shown from the circumstances or condition of the persons contracting. This seems to go farther than the rule of law, which says, "fraud must be proved and not presumed;" but it has been wisely established in this Court, to prevent one man from [*676] taking an unjust or surreptitious or extorsive advantage either of the weakness or necessities of another; knowingly and designedly to take an unjust advantage of another man's necessities is equally against conscience, as to take the like advantage of his weakness or ignorance. He is equally incapable of acting or judging freely, or taking care of himself in the one case as well as the other.

4thly. Fraud, or *dolus malus*, may, in the consideration of this Court, be collected or inferred from the nature and consequences of the transaction, as being an imposition or deceit upon other persons not parties to the fraudulent agreement. Of this kind are the cases of marriage brokerage contracts; for in them neither of the parties to the contract for brokerage is defrauded or deceived, but they necessarily lead to the deceit or delusion of one of the parties to be married, or of one of their parents, guardians, or friends. So of private clandestine agreements, to return to a parent or guardian part of the wife's portion, or of the provision stipulated for the husband. In most of these cases, the parties to the clandestine agreement know what they do; but the fraud or deceit operates against one of the parties to be married, or their friends who transacted the public marriage agreement for them. In like manner, where a debtor enters into a deed of composition with his creditors for 10s., or any other rate, in the pound, attended with the usual proviso, that all his creditors "do accept this

(i) 1 Leon. 111.

composition and execute the deed within a certain time;" the debtor privately agrees with one of his creditors in order to induce him to sign this deed, that he will pay or secure to him *a greater sum* in respect of his particular debt; in this case there may be no imposition or deceit upon the debtor who is party to this particular agreement, but it tends to deceiving the other creditors, who proceeded in consideration of and relied upon an equal composition in respect of themselves, and upon a benevolent and advantageous consequence to the debtor in respect of the ease given him; and, therefore, that Court relieves against it. So of premiums contracted to be given for preferring or recommending persons [*677] to public offices or employments. *Neither of the parties to those agreements is defrauded or deceived, they proceed with their eyes open and intend what they contract. But the persons who have the legal authoritative appointment to these offices are, or may be, deceived by it; or if the person agreeing to take the *premium* has in himself the authority to appoint, it tends to the deceit and prejudice of the public service, by making way to introduce an *unworthy object* for an *unworthy consideration*. The stating of these cases, thus generally put, shows what Courts of equity mean, when they profess to go upon reasons drawn from *public utility*. In order to weaken their force they have been called *political arguments*, and introducing *politics* into the decisions of Courts of Justice. This was showing the thing in a light which best served the argument for the defendant, by taking the word *politics* in the common vulgar acceptance. But if it is considered in its true original meaning, it comprehends every thing that concerns the good government, public policy, or order of a country, of which the administration of justice is one essential and principal part. And in this sense such *political arguments* have been and must always be admitted, both in Courts of law and equity. To apply this—How far is this relief dispensed in Courts of equity founded on *public utility*? or how far is *public utility* or any *political principle* concerned in it? Thus far, and in this sense. Particular persons, in their contracts, shall not only transact *bond fide* between themselves, and not cheat or deceive one another, but shall not transact *malâ fide*, there shall be no *dolus malus* in respect of other persons who stand in such a relation to either of the parties, as they may be affected by the contract, or the direct consequences of it. And as the rest of mankind, besides the particular persons contracting, are concerned in this, it is properly said to be grounded on public utility.

5thly. I have reserved for the last place that head of fraud on which the relief sought by this bill has been chiefly rested; I mean that species of *fraud* which has been held to infect *catching bargains with heirs* [*678] or *reversioners*, in the *lifetime of a father or any other ancestor, against which this Court has, in all times, extended its relief. Now, these have generally been mixed cases, compounded of all or at least several of the topics of *fraud* mentioned under the other heads. There has, sometimes, been proof of *actual fraud* and *circumvention*, and that is decisive in the cause. There has always been fraud collected or inferred from the *circumstance or condition* of the parties contracting: weakness or necessity on the one side; avarice, oppression, or extortion on the other; or, at least, *advantage taken* of that weakness or necessity. Always an *appearance of fraud* in some degree, from the

intrinsic nature of the bargain, that it has been *unconscionable and oppressive*. This was the particular ground on which my Lord Jefferies relieved Mr. Berney against Pitt, and reversed my Lord Nottingham's decree; and there is no declaration of any *imposition or circumvention*, so far as appears by the book. In most of these cases, there have concurred *deceit and delusion* upon some other persons who are not parties or privy to the fraudulent agreement; the father, ancestor, or relation, from whom the expectation of an estate or accession of fortune has been derived, has been kept in the dark: the heir or expectant has been kept from submitting himself to them, from disclosing his circumstances, and resorting to them for advice and assistance, which might have tended not only to his support but to his reformation. Thus misled and deceived, his father, ancestor, or relation, hath been seduced to leave his estate, not to his son, or relation, or his family, but to a set of devourers, who have divided the spoil beforehand.

Consider, in the next place, which of these ingredients have been insisted, I don't say proved, to enter into and infect the contract of May, 1738.—There is certainly no colour of evidence, in this case, of actual fraud and imposition in the defendant. I really believe, Sir A. Jansen did not think he was doing any thing immoral or unjust, though, if Mr. Spencer's declaration, proved by Loftin, could be judicially believed, he had misgivings how far it would be *held good in this Court: [*679] but though this case stands clearer of actual fraud than almost any of this kind that has come before the court; yet several things have been strongly insisted on, upon the part of the plaintiff. That here was necessity on one side, and advantage taken of it on the other, the very hawking about such a proposal speaks it; that here was an unconscionableness in the intrinsic nature of the bargain. Why should Mr. Spencer be put to borrow money? for the proposal was to borrow and lend on the terms of paying two for one, in case the Duchess of Marlborough, an old lady, of seventy-eight, had died next week or next day? That here was deceit and delusion on the Duchess of Marlborough, his grandmother, who stood *in loco parentis*, from whom his great expectations were; this was averred and intended, and is proved to have been so by Mr. Backwell, who appears to have negotiated for both sides. I admit there are more circumstances alleged on the side of the defendant to weaken the force of these reasons, than have concurred in most of the cases. Mr. Spencer, a man of thirty, placed in a great rank and figure in the world, possessed at the time of a great estate of his own, not weak in his mind, but of good sense and parts, applying this money to pay off tradesmen, honest creditors, and finally of a broken constitution to a certain degree, though in that the witnesses differ. If it was necessary for me to give a positive opinion on this great point now, I would minutely consider the weight of those objections and answers; but, as I do not intend it, I will only take notice further of what has been relied upon to cure and sanctify the whole—I mean the contingency inserted, in 'case he should survive the Duchess of Marlborough.' I would not have it gone away with, that the insertion of such a contingency or risk would *in every case* sanctify and establish such a bargain. Suppose such a bargain were made with a son in the lifetime of his father or grandfather, on whom his only dependence, and from whose estate, coming to the borrower, the only fund for payment of the money must

arise—I appeal to the understanding of mankind, of what consequence is [*680] the insertion *of such a contingency, or how does it lessen the value of the security? If the son or grandson dies in the lifetime of the father or grandfather, and the estate never comes to him, the lender knows there never can be any fund for his payment. He might, indeed, lay up the debtor's body in a prison, but that pays neither principal nor interest. Therefore, whether such a contingency is inserted or not, it will come to the same thing. He knows the fund for payment must depend on his debtor surviving his father or grandfather, whether the payment is expressed in words to depend upon that contingency or not. I have, therefore, always thought there was good sense and great force in what Mr. Vernon reports to have been said by the Court in *Berney v. Pitt*—"That the inserting the clause in the defeazance, 'that the defendant should lose his money, if the plaintiff died before his father,' did not at all differ the case in reason from any other bargain made by the plaintiff, or any other remainder-man in tail, to be paid at their father's death; for that, in these cases, if the son died, living the father, *the debt would be lost of course*, and, therefore, the expressing it particularly in the defeazance, made the bargain the worse, as being done to colour a bargain that appeared to the defendant himself *unconscionable*."

I have not mentioned the reasons drawn from the discouragement of prodigality, and preventing the ruin of families, ingredients which the Court has often wisely taken along with them.

Mr. Attorney said it was vain and wild for Courts of Justice to proceed upon principles to restrain prodigality and prevent the ruin of families. If he had said it was ineffectual in many flagrant instances, I should have agreed with him. But I cannot hold that to be vain and wild, which the laws of all well-constituted governments have endeavoured to do as far as possible; which all wise legislators and able judges have pointed their acts and decisions against. The law-makers in ancient Rome, and the Roman Senate, were not so weak as not to know that laws to restrain prodigality, to prevent sons running in debt in the life of their fathers, [*681] would in many, perhaps in most instances, be fruitless and ineffectual; yet they made their laws to put prodigals under tutelage; they made their famous *senatusconsultum Macedonianum*; they invested the prætor with various and strong powers, (k) happy if, in the event they struck some terror, gave some check to that torrent of mischief—*est quodam prodire tenus si non datur ultra*.

Mr. Solicitor objected, that, for this court to proceed on such general principles, was to assume a legislative authority, and instanced several acts of Parliament to restrain and make void contracts of a pernicious tendency to the public. Whatever can properly be called, "assuming, a legislative authority in this Court," I utterly disclaim; but, notwithstanding that, I shall never be afraid or reluctant to exercise that jurisdiction in this Court which I find established. And where I see a ground of relief settled by a series of precedents of my predecessors, not reversed or controlled by that supreme Court which alone has the correction of the judgments of this, I shall adhere to them. Therefore, as far as my Lord Jeffreys went in the case of *Berney v. Pitt*, (l) as far as my Lord Cow-

(k) Dig. L. 14, tit. 6; Grav. Orig. Jur. L. 3, s. 35, 69, pp. 72, 134.

(l) 2 Vern. 14.

per went in that of *Twisleton v. Griffith*,^(m) as far as my Lord King went in that of *Curwen v. Milner*,⁽ⁿ⁾ and as far as my Lord Talbot declared his opinion upon the original transaction in the case of *Cole v. Gibbons*,^(o) so far, and as far as those principles do naturally and justly lead, I shall not scruple to follow. As to the acts of Parliament which have been mentioned, it will be found upon examination that many, though not all of them, were made, not for want of power in this Court to give relief against some of those contracts, but in order to make them void at law; to give the party a strict legal bar against them, and to save the expense and delay of coming into this Court for redress.

I am sensible I stand in need of much excuse for having spent so much time on this subject, when the judgment I am *going to give [*682] will not turn upon it; but I have done so, that the work of [*682] this day may not be misunderstood, and that it may not be rumoured abroad that the former precedents had been shaken; that this Court was departing from the principles my predecessors had wisely established; and that a licence was proclaimed to every iniquitous and unconscionable bargain, because *voluntarily*, and what is vulgarly called *fairly*, entered into, like what is called *killing fairly* in a duel, which yet the law never allows for an excuse in murder. It is so notorious, that it wants no proof that annuities for life, junctims, post-obits, extorted or surprised from young gentlemen, before they feel the weight and value of their estates, are grown into a settled traffic; that there are brokers for them about this town, who perhaps set—always encourage them. This must and ought often to abate the weight of appearances of fairness in the person whose money is advanced. He may be kept behind the curtain, when the broker, the real transactor, may know the whole. I was the rather desirous to shut the door against such a misapprehension, for fear it should have the consequences which my Lord Cowper suggests did probably follow on Lord Nottingham's first determination in the case of *Berney v. Pitt*, 'that the practice of devouring young heirs took heart and increased from that decree.'

I come now to the last point, whether the new security given in October, 1744, after the Duchess of Marlborough's death, amounts to such a confirmation of the former contract, or to such a new agreement by Mr. Spencer, as is sufficient to bar the plaintiffs, his representatives, of any relief in this cause? This is the point upon which the determination of this cause will turn, and I entirely agree with the opinion that has been already delivered. Had the first bond been void by the statutes of usury, no new agreement or new security to pay more than the principal advanced and legal interest would have supported or made it better. The original corruption would have infected it throughout; but in cases of bargains subject to equitable objections, upon which this Court might relieve, *it is otherwise, and a man fully informed, and with [*683] his eyes open, may fairly release or come to a new agreement and bar himself of that relief. The Duchess of Marlborough died the 18th October, 1744; then the money became due according to the condition of the first bond; the new bond bears date the 19th October, 1744, but was not executed till the beginning of December following. After this Mr.

(m) 1 P. W. 340.

(n) Cited 3 P. W. 293

(o) 3 P. W. 290.

Spencer did two further acts of confirmation, by paying two sums of 1000*l.* at different times in part of the debt. The material inquiry is, was this done after full information, freely, without compulsion, and with fairness? The evidence upon this head has been particularly repeated; and, upon the best consideration I can give, it appears to me to be so. I will state only the result.

1st. Mr. Spencer's condition of necessity was over; for, though he had no power over the inheritance and capital of the Duchess of Marlborough's estate, he had an accession of income of 20,000*l.* or 21,000*l.* *per annum* added to about 8000*l.* *per annum* before. A little more than one third of one year's revenue would have paid off the whole demand. If this can be called a state of *necessity*, how far shall we carry that?

2nd. The state of expectancy, which, being a distant prospect, sometimes tempts people to load or incumber it upon exorbitant terms, was over, for every thing to be expected from the Duchess of Marlborough was come into possession.

3rdly. The Duchess being removed out of the way, the danger of her coming to the knowledge of his conduct and circumstances, and his fear of offending her, by that means were also removed out of the way; this appears to have been the principal reason of his taking such methods of raising money, and the principal restraint upon him from seeking relief in a Court of justice.

4thly. There was then no ancestor or relation left on whom any deceit or delusion could be committed in consequence of any new agreement.

5thly. It appears from Loftin's evidence, that, before this new bond [*684] was given, Mr. Spencer had sufficient notice that *he had a chance, at least, of relief in a Court of equity; for he declared that the defendant had himself *confessed it was doubtful whether the first contract was valid in law and equity*. This was information abundantly sufficient to open his eyes.

6thly. In this situation there was no impediment against seeking this relief, nor any hazard from disclosing the whole case in a Court of justice.

Under these circumstances Mr. Spencer gave the new security, without any fraud, surprise, or contrivance, to draw him into it; and I think they operate more strongly to support it than the deed of confirmation in *Cole v. Gibbons*, (*p*) allowed by two Lord Chancellors. In that case it is observable that my Lord Talbot says, expressly—"had all depended on the first assignment, he would have set it aside, as being an unreasonable advantage made of a necessitous man; but seeing that Martin was afterwards fully apprized of every thing, and yet chose to execute a deed of confirmation of his former assignment, and since not the least fraud or surprise appeared in that transaction, it was too much for any Court to set all this aside." The only difficulty insisted on to distinguish that case from the case now in judgment was, that there Martin, the releasor, was not in the power of Cole, the releasee; for the first transaction being only an assignment of a contingent legacy, Martin was no debtor, and Cole could have taken no remedy against him. But here Mr. Spencer was a debtor, and Sir A. Jansen might immediately have distressed

him by an action. The answer to this is, that there was neither attempt nor threat of bringing an action, but all the civil complacent usage possible, repeatedly acknowledged by Mr. Spencer himself. It was further objected, that the case of *Cole v. Gibbons* was single, and that there are several precedents in which such new securities and subsequent transactions have not been suffered to give a sanction to demands of this nature; namely, the *Earl of Ardglass v. Muschamp*, (q) where there was a release from the *Earl of Ardglass, the nephew, who had been imposed upon, executed after the bill brought; and yet it was [*685] not suffered to prevail, but set aside. But under what circumstances was that release obtained? After Muschamp had obtained from his nephew his fraudulent grant of a rent-charge of 300*l. per annum* in fee for 300*l.*, the nephew made a settlement of his estate on his uncle in failure of issue male of his own body. Then the uncle brought a bill in his own name, and joining his nephew with him, to set aside the rent-charge for fraud. The defendant Muschamp gets the nephew, though a co-plaintiff, separate from his uncle, and procures a release, without any consideration pending the trial. The nephew died, but this caused no abatement as to the uncle, the remainder-man, he carried on the suit to a hearing, and this release, so obtained, was held not to stand in his way. The other case was *Wiseman v. Beake*, (r) *coram* the Lords Commissioners, in 1690; but the confirmation there was more extraordinary than in the last: for, after the original fraudulent bargain obtained, the book says, that Beake, understanding that the Chancery began to relieve against such bargains, advised with Serjeant Phillips what was fit to be done in the case, and thereupon a bill was brought against the plaintiff Wiseman to compel him either to re-pay the money advanced with interest, or to be foreclosed of any relief against this bargain; and that, in answer to that bill, Wiseman had declared he elected to stand to the bargain; that it was fairly and duly made, and that he would not seek any relief against the same; and, therefore, ought not now to be relieved against his own election and oath: but the Court would not suffer this to prevail as a confirmation, saying, it was only a *contrivance to double-hatch the cheat*; and it was rightly said, Wiseman being exactly in the same circumstances of necessity and distress at the time he put in his answer as when he made the bargain,—his uncle, on whose death the contingency was put being still living; and it was proved, that the contrivance *to gain [*686] a sanction to the fraud was by abuse of the proceedings of this Court. This was certainly a strong aggravation of the fraud and ill practice; for, there is nothing which Courts of equity do more rigorously discountenance, than such amicable suits to support fraudulent transactions by confessions in answers. Besides, in both these cases, the original transactions were manifestly and grossly fraudulent; but I have gone no farther in the case now in judgment, than to show it to be a *doubtful object of relief* in this Court; and surely a case of *balancing and doubt* is the most proper of all others to be put an end to between the parties, by a new agreement fairly entered into.

Upon the whole, the only relief I can give the plaintiffs, is against the penalty of the last bond, and the judgment upon it. Upon this relief the only doubt which could arise, is as to the costs of suit; and as to the

costs in this Court, I am of opinion the defendant is not entitled to them. The plaintiffs are only executors, the contract far from deserving favour, and the plaintiffs had certainly *causam probabilem litigandi*; and I observe, that, in *Cole v. Gibbons*, which as this was determined on the point of confirmation by the subsequent transaction, Lord King, at the first hearing, dismissed Martin's cross bill, which sought to set aside the assignment, without costs; and gave Cole, the assignee of the legacy, no costs upon his original bill. This appears by a copy of the decree. It is true, that in that case there was no penalty, and here is one; but still that don't take away the discretion of the Court to give costs or not according to the circumstances of the case.

So decreed on account of principal and interest on the bond, 19th October, 1744, and defendant to have his costs of law, and upon payment of what should be found due thereon, the bond to be delivered up and satisfaction acknowledged on the judgment. But no costs in this Court on either side, unless plaintiffs should make default in payment, in which case their bill to stand dismissed with costs.

[*687]

*(B).

MINCHIN v. NANCE.

THE circumstances of this case will be found stated at sufficient length, *ante*, p. 628.

(C).

NUGENT v. GIFFARD.

(MICH. 12 GEO. 2.—IN CHANCERY, 1738.)

SIR RICHARD BELLING lent, in the year 1711, the sum of 3000*l.* upon a mortgage, which he took in the names of Knight and Longueville, and dying, in 1716, possessed of a personal estate of 40,000*l.* and upwards, by his will made his son, Mr. Arundel Belling, his sole executor and residuary legatee; who having in his father's lifetime borrowed, upon two bonds, the sum of 1600*l.* of Knight, after his father's death, in the year 1718, assigned the trust of this mortgage to Knight, as a farther security for the money due on those bonds. Mr. Arundel Belling afterwards died insolvent, having wasted the whole personal estate which came to him from his father.

The bill was brought by the representative of Knight, for satisfaction of the debt out of this mortgage, against the Lady Giffard and Mrs. Arundel, the daughters and co-heirs of Mr. Arundel, and against the mortgagor's heir-at-law, and also against the executor of the surviving trustee of the legal estate.

The defendants, the Lady Giffard and Mrs. Arundel, insisted, that, on their mother's marriage with Mr. Arundel, articles were executed.

Whereby Sir Richard Belling covenanted to settle 10,000*l.* with 5000*l.* more (their mother's fortune,) on Mr. Arundel and his wife, with several remainders *to the issue of that marriage, and, that covenant having never been performed, that Sir Richard Belling's personal estate, which came to the hands of Mr. Arundel, was bound by it; and that there being no legal assignment of the mortgage to Knight, it still continued part of the specific assets of Sir Richard; and consequently, subject to their incumbrance, which was prior to the plaintiff's; that this covenant was a lien on Sir Richard Belling's personal estate: and that Knight having lent his money upon a security which he knew to be part thereof, must be considered as having notice of whatever was a charge on the security. [*688]

The plaintiff insisted that Knight had lent his money fairly without notice of such article, and that Mr. Arundel, as sole executor and residuary legatee of Sir Richard Belling, had an absolute power over his personal estate, and might dispose thereof as he thought fit; and that the assignment to Knight being for a *bond fide* consideration, it ought to be looked upon here in the same light as an assignment of a legal estate would be at law.

LORD HARDWICKE, C.—The defendants, the Lady Giffard and Mrs. Arundel, insist that they are creditors of Sir Richard Belling; that the trust of the mortgage in question is part of his specific assets, and being such, must be applied to pay his debts, before it can be applied to the payment of any debt of Mr. Arundel's, who was only an executor to him; and that this assignment by the executor is not such a disposition as can take place against them, but that they may still follow the assets. Their claim arises upon their father's marriage articles, whereby Sir Richard Belling covenanted to settle the two several sums of 10,000*l.* and 5000*l.* upon Mr. Arundel and his wife, with remainders to the issue of the marriage. There was no son, but only two daughters (the defendants,) of that marriage; who now say that they are entitled to have this money raised, although the case that hath happened of there being no sons and but daughters of the marriage, be nowhere mentioned in the articles; but I am of opinion (was it necessary for me to determine *it,) that the defendants are well entitled to have [*689] this money raised, although this particular case be not expressly provided for, because this Court will construe articles in the most liberal sense, for the benefit of the issue of the marriage. But, at the same time, I think the disposition that hath been made by the executor a good one, and that they cannot disturb it. I must take notice that there is a power of revocation in Sir Richard Belling and his lady, and the survivor of them, to revoke all the uses of these articles, and limit such new ones as they think fit; so that although the defendants be creditors, they are so under the circumstances of being liable to a power of revocation, though that indeed does not appear to have been executed. Taking them, therefore, to be creditors, the question is, whether they can follow this sum of 3000*l.* in the hands of the plaintiff, so as to have the benefit of it as specific assets; and I am of opinion, that they are not entitled to follow it as specific assets, but that the plaintiff hath a good right to retain it as a security for his debt. There is no doubt but that in point of law, the executor hath the power of disposing of and aliening the assets and that when he hath

so done, no creditor can follow them, because his debt is, in law, no lien upon the assets, but only a demand on the executor. This Court indeed goes farther, and will follow them into the hands of others besides the executor; and therefore if an executor pay a legacy, and leave debts unpaid, this Court will not suffer the legatee to run away with the assets, and disappoint the payment of the debts; and so in other cases of the like nature. But this does not hold in any case where the executor aliens or disposes of them for a valuable consideration, *for unless there be some fraud* this Court will not control the power of executors exercised in that manner no more than the law does; and it would be of very bad consequence if it did, for then no man would care to deal with executors, and this on the highest reasons, since a purchaser cannot come here to have an account of the debts, nor hath any way to know what debts are

[*690] standing out, which *would put such difficulties upon purchasers as to render assets unalienable. It was objected, that, in the present case, the assets are not legal but equitable only, because the legal estate being in the trustees, of whom Longueville was the survivor, Knight did not acquire any legal but only an equitable estate; and that by the rules of this Court he took it, subject to all the equity it was burthened with in the hands of the person who made the assignment. That, indeed, is the general rule of the Court, but it holds only where the thing itself is charged with that equity, not where there is but a bare demand against the person of the executor. Nor does this Court make any difference between the executor's power over legal and equitable assets; and it would be very mischievous was there any; for suppose an executor takes a trust term, he could never sell it, since it would be liable, in the purchaser's hands, to any debts of the testator, notwithstanding money had been paid for it, there being no difference made where there is money paid and where not. The next objection was, that Knight took the assignment of this trust, with notice of its being part of Sir Richard Belling's assets, and therefore knew it was liable to his debts; but this objection would hold equally in all other cases of purchases from executors, where the purchaser derives his title from him. The next thing that was objected was, that here was no consideration of money paid by Knight, but only of debts due before, which were contracted in the life of Sir Charles Belling, and that therefore this was a *devastavit* to which Knight was party, and which he knew to be so. But I do not find that this Court hath laid it down for a rule, and if an executor sells for money or debts due from himself, this shall affect the security in the hands of the assignee; for suppose here had been money paid down, might not that money have been misapplied? Nay, he might have paid those very debts with it; but if the transaction be a fair one, I do not see where is the difference, since money that is *bond fide* due, is as good a consideration as money actually paid down. The two authorities that were cited to support the defendant's pretence

[*691] are, first, that of **Crane v. Drake*,^(s) for which I have looked into the Register's book, and thereby the ground of that case appears to have been the notice which the purchaser had of the plaintiff's debt, and was admitted by him in his answer. Now apply that to the words of the Lord Cowper's resolution, where he puts it on

(s) 2 Vern. 616.

the contrivance to defeat the plaintiff of his debt, and it makes a strong case that where debts are standing out, and a person hath notice of such debts, and then discounts his own debt due by the executor, such a transaction is a fraud. But that differs greatly from our case, where there is not even a suggestion that Knight knew of Sir Richard Belling's having any debts whatever; and the clause read out of the Lady Gifford's answer, goes a great way to show the contrary, for she says that Sir Richard Belling left a personal estate of 40,000*l.* which her father wasted; and if so much was left, it rather argues that there were no debts than it does notice of this debt, which arose by a marriage settlement amongst themselves in private, so that this case of *Crane v. Drake* does no way come up to the present one, being singly founded on the notice from which the Lord Cowper inferred a collusion, and grounded his decree thereupon. The next authority that was relied on was that of *Paquet v. Hoskins*,^(t) which was a very clear case; for there was no alienation of any particular chattel to a purchaser for a valuable consideration, but only the wife's fortune computed at 6000*l.*, and taken with the plainest notice of its being subject to an account, which no way resembles the case of a purchase of a term, or other distinct thing, for the use of the purchaser, so that there was the plainest and highest equity in the world. I therefore think these cases do not come up to the present one, and am of opinion, upon the whole that this is a good assignment, and that the plaintiff is entitled to the benefit of it. But here being three bonds, the last of which was entered into in the year 1724, for the sum of 400*l.*, which was long after the assignment, and not appearing to be taken in exchange of either of the old ones, I cannot decree satisfaction for more than *the other two; and as to that one, he must [*692] come in as a creditor on Mr. Arundel's assets.

And so decreed the two bonds to be paid out of the mortgage money.

(D.)

MEAD *v.* COM. ORRERY & AL.

TRIN. 19 GEO II.—IN CANC. JULY, 1745.

JOHN MEAD, the elder, was entitled to a mortgage in fee, which had been conveyed to a trustee for him, and by his will gave the residue of his personal estate to be equally divided between the plaintiffs, his children, and his other son John Mead, the banker, and made him, his own wife Jane, and his brother William, executors in trust, and died in 1712. John Mead, the son, was in 1726 appointed by this Court receiver of the Duke of Buckingham's estate, and being called upon to give security, he proposed to assign this mortgage to the Master, as a security for his duly accounting; he, his mother, and William Mead, all averring that he had paid all his father's debts, and satisfied his brothers and sisters for their shares of the residue of the father's estate, whereby he was really entitled to all the money due on the mortgage; and it likewise appeared, by

(t) *Preced. in Chan.* 431.

his father's books of account kept in the shop, that he and his uncle, and partner William, had paid 1500*l.* more than they had received upon account of the father's debts, and of what had been paid to the children.—By indenture, in December 1726, the executors of the father and the surviving trustee of the term conveyed the mortgaged premises to the Master, thereby reciting that there was then due on the mortgage 9000*l.* and upwards, and that it was the proper money of John Mead, the younger, and the provisio in the deed was to reconvey to John Mead and his heirs, upon his duly accounting as receiver.

[*693] John Mead, the younger, died in 1727, greatly *indebted to the Duke's estate, much more than what was due on the mortgage, and the defendants, who, as executors to the Duchess of Buckingham, stood in the Duke's place, insisted on retaining this as a security against the plaintiffs, the other children of John Mead the father, who brought their bill to impeach the assignment, insisting that the mortgage was part of their father's estate, and that they had never been satisfied for their shares of the estate, and that the defendants having notice of the will, this was not such an alienation by the executors as ought in equity to bar their right.

For the plaintiffs it was argued, that the defendant and her agents having notice of the will at the time of taking the security, must know it was a breach of trust in the executors, to assign this as a security for one of them, unless it was actually the money of that executor, that this appeared from the recital of the deed itself, and they could claim it upon that foundation only, since here was no reliance on the executor's power to convey, for if there had, it would have been so said in the deed; but here the deed relied on his being *entitled* to the money, and must therefore prove it, which distinguished the present case from the common cases of alienations by executors. That this security was irregularly taken by the Master instead of a recognizance, without any order of Court, but that taking this as an alienation of assets by executors, it was not such as in equity would include the residuary legatee's claim upon it as assets, but still continued such in the defendants' hands, the rule of equity being, that to bar the claim of legatees or creditors, the alienation must be *bond fide*, and such as in itself appears to have a tendency to a right administration. That all the cases proved this rule, as *Nugent v. Gifford*, 13th November, 1738; *Humble v. Bill*; *Crane v. Drake*, 2 Vern. 444, 616; *Hume v. Dubarry*, 27th November, 1723; *Wilcox v. Watson*, Cro. Eliz. 405; *Paget v. Hoskins*, Prac. in Chanc. 431; and that the giving this as a security for his accounting as receiver, had no tendency to right administration, as paying or securing a debt due to the executor had.

[*694] *Lord HARDWICKE, C.—I do not approve of the Master's taking this security for a receiver, without an order for this purpose. This was irregular; but that concerns only the Duke and his representatives, for as to the plaintiff it would be very hard if the security should be affected by the misbehaviour of the Master.

The first general question made in this case is, Whether the plaintiffs be entitled to relief against this assignment by their father's executors, which will depend on its being or not being a good alienation in equity of part of John the father's assets by the executors against the residuary

legatees. At law it must be admitted to be good, for there a *devastavit* without fraud leaves the executor only liable to creditors or legatees. The legal estate clearly passed, the only doubt therefore is, whether it be a good assignment in equity, and the defendants having gained the legal estate for a valuable consideration, the equity must be very clear and strong to take it from them. For that purpose it was said that the defendants, or those in whose place they stand, had notice of this being assets, and, consequently, a trust for the plaintiffs. Now in equity, notice will, in many cases, overturn a purchase for a valuable consideration; for a purchaser, with notice, takes at his peril, liable to the equity of what he has notice of. In the present case, the notice was, that this mortgage was assets. Now the cases cited of trusts are not applicable to executors, because whoever takes from an executor, as executor, must have notice of the will, and if that was a notice to affect purchasers, nobody would venture on a purchase of any part of the assets. This kind of notice will not be sufficient of itself to affect this assignment. It must also be observed that this is the first attempt by a residuary legatee to overturn an assignment for consideration made by executors, for those cited have been by creditors who have a general lien on the assets, or by a specific legatee who has a particular lien subject to debts. Both these cases differ from that of a residuary legatee, for he has no general demand on the whole, nor any particular part of the assets.

As to the particular points insisted on to impeach this assignment. 1st. It is said they took this mortgage not as executors, but trustees, there being a devise of all the real and personal estate [*695] to them, their heirs, executors, and administrators in trust to pay debts. But this will not, I think, alter the case, and they must be considered as executors in this question, for a man cannot make his executors trustees of his whole personal estate so as to restrain their general power as executors, though he may of part, as in *Humble v. Bill*. Next it is said, that if they took as executors, still this is not a proper disposition in equity of the assets having no tendency to a right administration. Now the right of executors is not a bare authority, but an interest, and legatees can't take but by the executor's assent. Then what ground of equity is here to interpose? It is admitted an executor may sell or mortgage for money, but it is said he cannot make an alienation for securing money to come into his hands, though he might apply that money as he thinks fit, and pay therewith, if he so pleases, the testator's debts and legacies. The cases cited don't come up to the present, for I can't find one where an assignment has been made for a valuable consideration, that the Court has permitted creditors or legatees to follow assets into the hands of an assignee, unless there has been an actual or presumed fraud in the executor and assignee. In *Crane v. Drake*, the assignee was the contriver of the *devastavit*, and it was done on purpose to deprive the plaintiff of his debt; and in *Paget v. Hoskins*, the assignment was taken expressly subject to the account. In that of *Humble v. Bill*, there was a difference of opinion between this Court and the House of Lords. There was a charge of 2000*l.* on a particular part of the estate, and was therefore made a security by the will in nature of a mortgage, and it would have been going a great way to say that the alienation of the executor should postpone the legatee, especially as it did not appear but that the assignee might take it subject to the prior lien. On the other side, the case of

Nugent v. Gifford has been relied on as an authority in point for the validity of this alienation. The question there was between the assignee of the executor and creditors of the testator; and upon consideration of [*696] all the cases, and the danger of breaking in upon the legal *power of executors, I held the alienation good. I don't see how that case differs from the present, except that this is stronger; for there the consideration was money due from the executor, here money to be paid to him, which might be applied for the purposes of the will. Besides, there are some circumstances which distinguish the present case from all those cited, and make it more favourable for the defendants; for this assignment was transacted with three executors, two of whom were not interested, and the third was a residuary legatee. They all join, and the recital was by all. Now this might become John Mead the younger's money two ways: either by his having really paid more than he had received of the assets, or by its being appropriated to him by the other executors, either by release or actual assignment. Suppose such assignment really made, and then he alone had assigned to the Master, could it then be pretended the plaintiffs had any right to follow it? If that was to be laid down for a rule nobody could take an assignment from a legatee of what is given in discharge of his legacy without going back into an account of the estate to see if rightly administered by the executor, and it would be saying that a residuary legatee can never part with what has been assigned to him by the executor. If then it would have been good, so when done by two deeds, how does it differ in being done by one only? for, as to the point of notice, that is the same in the one case as in the other. This deed with its recitals and provisoes amounts to all this, and imports an assignment by the other executors to John Mead, subject to the defendants' demands. As this assignment therefore proceeded on the recital of all the executors, and was a *bond fide* transaction, I think I cannot break into it. The bill in this case was not filed till twenty-seven years after John Mead the father's death, and long after the assignment, and the consequence of setting the assignment aside would be directing accounts, which it is next to impossible at this distance of time to go through.

Upon the whole, therefore, I am of opinion that the plaintiffs have not a sufficient equity to set aside this assignment, as there was no fraud, was made for a valuable consideration, and the legal estate gained by the assignees from two *executors not interested, and who might [*697] have assigned it to John Mead, the son, at that time, for his share or in satisfaction of what he had advanced.

(E.)

LANGLEY v. Com. OXFORD.

(PASCH. 21 GEO. 2.—IN CANG. MAY 14, 1748.)

LANGLEY sold an estate to Mr. Edward Harley, father to the now Earl of Oxford; and 10,000*l.*, part of the purchase-money, was left in Mr. Harley's hands. Langley made his will, and thereby gave two

legacies of 3,000*l.* and 1,000*l.* out of the 10,000*l.* Mr. Harley afterwards paid the 10,000*l.* to Langley's executor, and now the legatees brought their bill against the Earl of Oxford, as executor to his father Mr. Harley, to have their legacies paid out of the 10,000*l.*, and to open the account, which had been settled, between Langley's executor and Mr. Harley.

LORD HARDWICKE, C.—The general question is, whether the plaintiffs, who are legatees out of these 10,000*l.*, are entitled to be relieved against this transaction between Langley's executor and Mr. Harley, as having a specific lien upon these 10,000*l.* It has been insisted, that these legacies are a specific lien upon part of the personal estate, and that the executor could not release, assign, or discharge this debt, without the concurrence of the specific legatees; and it has been compared to the case of an equity upon a particular thing, as upon a bond assigned for the benefit of a third person; and the general rule is so, if there be notice to the obligor. But there is a great difference between that case and the case of legacies. Upon the assignment of a particular debt, there is nothing to be done but taking an account of that particular debt; and the assignee may as well state the account as the assignor; but in the case of legacies it is otherwise, there must be an account of all the assets and of the debts, *in order to see, whether, after the administration of all the [*698] assets, the specific legatee will be entitled to the thing devised to him; and if the reasoning drawn from the assignment of a bond was to hold here, it would hold equally where a term is sold by an executor for payment of debts, the devisee of the term might overturn the sale. The case of *Bill v. Humble*(a) is something to this purpose. That case had different fates: In this Court the mortgagee of the term prevailed, but the decree was reversed in the House of Lords, though I lay no great stress upon the note at the end of the report; those notes being generally imperfect, and never giving the reason of the reversal, which it is often difficult to find out, though one sometimes guesses at it from the printed cases. The reasons given by Lord Keeper Wright are very strong, and the laying down a rule that assets should be so affected by a specific legatee, as not to be alienable without his consent, would be attended with many inconveniences. I have found somewhere, that a distinction was taken in the House of Lords in that case of *Humble v. Bill*, that *Humble*, coming in as a mortgagee, might take the term subject to the legacy, which he could not be thought to have done if he had purchased and paid the full value of the term. An executor is not bound to assent to a legacy; and though this Court will compel him to it, yet if, upon a bill brought for that purpose by a legatee, the executor insists that there are debts, and not sufficient assets to pay them, the Court will not decree him to assent until an account has been taken of the assets and debts. Indeed, as it is said by the Master of the Rolls in the case of *Ewer v. Corbet*,(b) if an executor should sell a part of the personal estate at an undervalue, this would be an evidence of fraud; or if a purchaser of a term knew that all the debts were paid, it would be a hardness in him to proceed in his purchase without the devisee's concurrence, and it might be too strong a determination, to support a sale so made without the devisee's concurrence. But the present case is distinguishable from

(a) 3 Vern. 444.

(b) 3 P. W. 148.

[*699] that of a term for years, the devise here being only of *3,000*l.* and 1,000*l.* out of 10,000*l.*, a devise of legacies out of a debt subject to a different litigation upon a long account. The whole debt is not given; and who had the right of stating the account with the debtor? Certainly the executor. Debtors would be greatly entangled, if, by the debtee's laying a charge upon the debt, they should be disabled from stating their account with the executor. Suppose two partners, and one of them gives a legacy out of his share, could not the other partner and the executor settle the account? I am of opinion they might; and there never was an instance where, in taking an account of a partnership, it was not thought sufficient to have the executor only a party. The law vests the power of settling the testator's accounts in the executor, and conclude the particular legatees by what he does; and that rule must not be broken in upon, without some particular reason. It would be very inconvenient and dangerous to say that an executor could not settle the account of his testator's assets, especially in this case, where so much the greater part of the debt was to come into the testamentary estate.

Bill dismissed.

(F.)

2 & 3 WILL. 4, c. 100.

An Act for shortening the Time required in Claims of Modus Decimandi, or Exemption from or Discharge of Tithes.

[9th August, 1832.]

WHEREAS the expense and inconvenience of suits instituted for the recovery of tithes may and ought to be prevented, by shortening the time required for the valid establishment of claims of a *modus decimandi*, or exemption from or discharge of tithes; be it therefore enacted by the [*700] King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our said Lord the King, his heirs or successors, or by any Duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence showing, in cases of claim of a *modus decimandi*, the payment or render of such *modus*, and in cases of claim to exemption or discharge showing the enjoyment of the land without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless, in the case of claim of a *modus decimandi*, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality or quantity from the *modus* claimed, or, in case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or

it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence showing such payment or render of *modus* made or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim, [*701] for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such payment or render of *modus* made or enjoyment had (as the case may be,) not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing.

II. And be it further enacted, That every composition for tithes which hath been made or confirmed by the decree of any Court of equity in England in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall be and the same is hereby confirmed and made valid in law; and that no *modus*, exemption, or discharge shall be deemed to be within the provisions of this act, unless such *modus*, exemption, or discharge shall be proved to have existed and been acted upon at the time of or within one year next before the passing of this act.

III. Provided always, That this act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters before mentioned, now commenced, or which may be hereafter commenced, during the present session of Parliament, or within one year from the end thereof.

*IV. Provided also, and be it further enacted, That this act shall not extend or be applicable to any case where the [*702] tithes of any lands, tenements, or hereditaments shall have been demised by deed for any term of life or number of years, or where any composition for tithes shall have been made by deed or writing, by the person or body corporate entitled to such tithes, with the owner or occupier of the land, for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this act, and where any action or suit shall be instituted for the recovery or enforcing

the payment of tithes in kind within three years next after the expiration, surrender, or other determination of such demise or composition.

V. Provided also, and be it further enacted, That where any lands or tenements shall have been or shall be held or occupied by any rector, vicar, or other person entitled to the tithes thereof, or by any lessee of any such rector, vicar, or other person, or by any person compounding for tithes with any such rector, vicar, or other person, or by any tenant of any such rector, vicar, or other person, or of any such lessee or compounder, whereby the right to the tithes of such lands or tenements may have been or may be during any time in the occupier thereof, or in the person entitled to the rent thereof, the whole of every such time and times shall be excluded in the computation of the several periods of time hereinbefore mentioned.

VI. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, feme covert, or lay tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

VII. And be it further enacted, That in all actions and suits to be commenced after this act shall take effect, it shall *be sufficient to allege that the *modus* or exemption or discharge claimed was actually exercised and enjoyed for such of the periods mentioned in this act as may be applicable to the case; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, deed, or writing herein mentioned, or any other matter of fact or of law not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of the matter claimed.

VIII. And be it further enacted, That in the several cases mentioned in and provided for by this act no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim.

IX. Provided also, and be it further enacted, That this act shall not extend to Scotland or Ireland.

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if the estate purchased be a house for residence, 161.

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1. By the same means, 455, and also—

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